Supreme Court, U. S.
FILED
MAR 16 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,

Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,

Appellees,

and

DOROTHY FRAZIER AND RUTH RATTLER, ET AL.

Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

JURISDICTIONAL STATEMENT

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March, 1976

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America, THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,
Appellants-Cross-Appellees,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees-Cross-Appellants,

and

THOMAS S. KLEPPE, ET AL., Secretary of the Interior of the United States of America,
Appellants-Cross-Appellees,

VERSUS

DOROTHY FRAZIER and RUTH RATTLER, ET AL.,
Appellees-Cross-Appellants,

and

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA BUSINESS COMMITTEE, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware Class,
Intervenors-Appellants.

On Appeal from the United States District Court for the Western District of Oklahoma

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JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants,[1] members of the Absentee Delaware Tribe of Western Oklahoma Business Committee whom the District Court certified as representative members of the defendant class, Absentee Delaware Tribe of Western Oklahoma, the statutorily-defined beneficiaries of the distribution statute here at issue, appeal from the decision of a divided panel of the United States District Court for the Western District of Oklahoma, holding unconstitutional and enjoining the operation of Pub.L. 92-456, 86 Stat. 762, 763, 25 U.S.C. 1291-1297, and submit this Statement to show that this Court has jurisdiction of the appeal, and that substantial questions of constitutional law are presented by the decision below.

OPINION BELOW

The opinion of the District Court of the Western District of Oklahoma, ___ F.Supp. ___, is not yet officially reported. A copy of the opinion, judgment and pertinent orders, prior and subsequent to judgment, are attached hereto as Appendix A.

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[1]The named appellants herein are also named cross-appellees in the cross-appeal filed by Wanda June Weeks, et al. Because the parties are numerous, the term appellants is employed to describe the named appealing parties on whose behalf this particular Jurisdictional Statement is filed.

JURISDICTION

This suit was initiated by appellee Wanda Weeks,[2] pursuant to U.S.C. Section 1331(a). Appellee's complaint alleged that 86 Stat. 762, 763, 25 U.S.C. 1291-1297, a statute distributing judgment funds appropriated to pay the Final Award of the Indian Claims Commission in Dockets 72 and 298[3] was invidiously discriminatory in (1) excluding appellee from its terms, (2) including the recipients named in the statute, and (3) depriving appellee of her property without just compensation, and was, therefore, violative of the Fifth Amendment to the Constitution.

Appellee sought an injunction restraining the operation of the statute. Pursuant to 28 U.S.C. 2282, a three-judge District Court, consisting of United States Circuit Judge William J. Holloway, Jr., Chief United States District Judge Fred Daugherty and United States District Judge Luther B. Eubanks was convened.

On September 5, 1973, a restraining order was entered, after notice to the parties. On March 21, 1974, a preliminary injunction restraining operation of the statute was entered, after notice and hearing, by Judges Holloway and Eubanks.[4] On December 18, 1975, the District Court

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[2]A similar suit was initiated by appellees Dorothy Frazier and Ruth Rattler in the District Court of the Northern District of Oklahoma and, thereafter, consolidated with this suit. The District Court's judgment was so entered as to cover both suits, on behalf of a single class of plaintiffs (App. pp. 3, 9).

[3]21 Ind. Cl. Comm. 344.

[4]Chief District Judge Daugherty was unable to be present at the hearing on the preliminary injunction. The hearing on the preliminary injunction was, therefore, conducted before the two judges named above. No objection is raised to this procedure.

entered its judgment holding 86 Stat. 762, 763, 25 U.S.C. 1291-1297 violative of the "equal protection component" of the Fifth Amendment, insofar as it excluded appellee and the class she represented. Notice of Appeal was filed on January 16, 1976 in the United States District Court for the Western District of Oklahoma (App. pp. 114-117). The jurisdiction of this Court to review the decision below by direct appeal is conferred by Title 28, United States Code, Sections 1252 and 2101(a). *Morton* v. *Mancari*, 417 U.S. 535, 535-537.

QUESTIONS PRESENTED

The District Court held 86 Stat. 762, 763, 25 U.S.C. 1291-1297, a statutory scheme distributing some nine million dollars to satisfy an award of the Indian Claims Commission, unconstitutional for failure to conform to the "equal protection component" of the Due Process clause of the Fifth Amendment. The questions presented by this holding of first impression are:

1. Whether, in the circumstances of this case, the holding of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-568, has, as the District Court implied, been overruled, *sub silento*, by *Baker* v. *Carr*, 369 U.S. 189, 210-211, 215?

2. Whether the decision of the District Court is inconsistent with *Morton* v. *Mancari*, 417 U.S. 535, 552-553 and n. 24, regarding permissible distinctions between individuals who are, or may be, members of federally recognized Indian Tribes and other individuals, who could be racially classified as "Indians," but who do not meet the statutory

or tribal criteria for membership in a federally recognized tribe?

3. Whether the District Court erred in limiting to its particular facts this Court's affirmance of *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, *aff'g* 224 F.Supp. 808 (E.D. Wash. 1965), and refusing to apply the principle of *Simmons* in the present case?

4. Whether Federal Rule of Civil Procedure 23(b)(1)(B) and 23(b)(2) were improperly employed by the District Court to avoid dismissing this action, and, if so, whether the admitted immunity of the tribal business committee from suit and its status as an indispensable party was disregarded through a use of class action procedure which contravenes this Court's holding in *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 512-513?

5. Whether the District Court erred in holding that Congress was forbidden by the Constitution from relying upon the holding of the Court of Claims that "the Indian Claims Commission Act requires that awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today?" *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971).[5]

6. Whether an Act of Congress, distributing judgment funds and involving a noncontractual, nonvested claim on

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[5]No question is raised as to the power of Congress to disregard this construction of the Act if Congress chooses; the question is whether the Constitution forbids Congress from adopting this construction of the Act if, after consideration, Congress elects to do so.

the public Treasury, must meet the rigorous standards of judicial review applicable to statutes involving criminal procedure, parental custody proceedings, marital and family relations, and other basic liberties of the individual, or whether the more flexible standard of review employed in areas of economic and social benefit legislation is applicable to such an Act of Congress?

7. Whether the holding of the District Court, which, as applied, requires that statutes distributing judgment funds be drafted so as to permit an individualized hearing of, and determination upon, the claim of every person who alleges ancestry in an Indian tribe from the "time of the wrong" is inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 776-785?

8. (a) Whether the District Court erred in adopting as a standard for constitutional review of Indian claims judgment statutes a theory of "but for" causation, inseparably linking the judgment statutes to the theoretical circumstances which could have, but did not, exist, at the "time of the wrong" without regard for any intervening circumstances or events, *e.g.*, by holding that if a sum certain had been paid to the Delaware Tribe in 1854, the Constitution requires a conclusive presumption that this same sum would have been a part of the tribe's assets decades later?

(b) Particularly, whether the District Court erred in holding that the Treaty of July 4, 1866, 14 Stat. 793, 796, by which the ancestors of the present "Kansas Delaware" claimants renounced their Delaware citizenship and right to participate in tribal councils, and assumed United States

citizenship and other benefits unavailable, at that time, to tribal Indians, see, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106, was irrelevant because the Due Process Clause commands Congress to conclusively presume "but for" causation in judgment statutes?

9. Whether, regardless of the standard of review employed, the terms of 86 Stat. 762, 763, 25 U.S.C. 1291-1297 are so arbitrary and capricious as to be violative of the Due Process Clause of the Fifth Amendment?

10. Whether the District Court erred in disregarding the congressional policy of distributing Indian claims judgment awards on a basis other than ethnological "tracing" of "blood descendants" from the "time of the wrong" for which the award is made, in the absence of an unequivocal showing that this congressional policy is repugnant to the Due Process Clause of the Fifth Amendment?

11. Whether the District Court properly enjoined the operation of an Act of Congress upon the complaint of parties alleging a monetary taking, rather than dismissing the complaint without prejudice to an action in the Court of Claims?

STATUTE INVOLVED

Pub.L. 92-456; 86 Stat. 762, 763; 25 U.S.C. 1291-97:

> "The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be neces-

sary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

"The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

"(a) they were born on or prior to and were living on October 3, 1972; and

"(b) they are citizens of the United States; and

"(c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

"(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary.

"All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director

in writing of its judgment regarding the eligibility of the applicant.

"(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

"(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided*, That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

"Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

"None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

"The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title."[6]

STATEMENT

Appellees, the "Kansas Delawares," certified by the court below as a "class" consisting of descendants of certain Delaware Indians who resigned from the Delaware Tribe pursuant to an 1866 Treaty between the Tribe and the United States, and whose names were, therefore, listed in an 1867 Registry prepared pursuant to this 1866 Treaty, see,

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[6]The other modern statute relevant to the District Court's decision is Pub.L. 90-508, 82 Stat. 861, 862, 25 U.S.C. 1181-1186. Other treaties and statutes relevant to the District Court's view of this case include: Treaty of May 6, 1854, between the United States and the Delaware Tribe, 10 Stat. 1048; Treaty of July 27, 1860, between the United States and the Delaware Tribe, 12 Stat. 1129; Treaty of July 1, 1866, between the United States and the Delaware Tribe, 14 Stat. 793; and Act of June 22, 1874, ch. 389, 18 Stat. 146, 175. Portions of the foregoing are set forth as Appendix B to this brief.

Elk v. *Wilkins*, 112 U.S. 94, 103-106, filed this suit alleging that 86 Stat. 762, 763, 25 U.S.C. 1291-1297, was arbitrary and capricious in its terms, and therefore, violative of the Fifth Amendment.[7]

Appellees alleged that Congress was required to distribute all funds from the Indian Claims Commission Award *only* to their class, *i.e.*, descendants of those who had resigned from the Delaware Tribe in 1866. Since Congress had distributed these funds to other individual Delaware Indians and to the statutorily-defined members of the tribal entities of two modern tribes, the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma, appellees sought to void the statute.

A majority of the District Court agreed with appellees as to one aspect of their equal protection claim and entered an injunction voiding the statute in its entirety.

Appellees' claim that all funds resulting from payment of the Final Award entered by the Indian Claims Commission in *Delaware Tribe* v. *United States* (Docket 241) and *Absentee Delaware Tribe* v. *United States* (Docket 27A) should, by force of the Constitution, have been appropriated and distributed to them alone was unanimously rejected by the District Court. The District Court also unanimously rejected appellees' contentions that (1) they had a vested right, within the meaning of the Just Compensation Clause of the Fifth Amendment, to any of these funds and (2) that

[7]Appellees also challenged the constitutionality of 82 Stat. 861, 25 U.S.C. 1181-1186 insofar as it included members of the Delaware Tribe of Oklahoma in its provisions; the right of the appellants herein to be included in the distributive provisions of this statute was conceded by appellees.

no member of the Delaware Tribe of Oklahoma[8] and no member of the Absentee Delaware Tribe of Western Oklahoma[9] could be named in the distribution statute.

However, a majority[10] of the District Court held that the statute was arbitrary and invidiously discriminatory in excluding certain descendants of individuals who had been members of the Delaware Tribe in 1854; that the Award entered by the Indian Claims Commission was to recompense an injury done to the tribe in 1854; and that Congress could not exclude certain "blood descendants" of 1854 Delaware tribal members without violating the equal protection component of the Fifth Amendment. The court below, in reaching this conclusion, found irrelevant the Treaty of July 4, 1866, 14 Stat. 793, 796, and this Court's contemporaneous interpretation of such treaties in *Elk* v. *Wilkins*, *supra*, 112 U.S. at 104-106, pursuant to which the ancestors of the Kansas Delaware claimants had: (1) resigned from the Delaware Tribe, (2) renounced Delaware citizenship, (3) taken United States citizenship, (4) taken individual tracts of land in fee from the United States and (5) received their pro rata share of Delaware tribal assets. It likewise found unpersuasive the lack of federal recognition of the individuals it certified as the Kansas Delaware Class, holding the constitutional question was one of blood descendancy rather than tribal structure or recognition.

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[8]Certified as a defendant class denominated the "Cherokee Delawares" by the District Court.

[9]Certified by the court below as the "Absentee Delaware" class (App. pp. 3, 91-93, 110-113). As discussed *infra*, we believe the *use* made of this "certification" was improper.

[10]Chief District Judge Daugherty dissented; Judge Daugherty held the statute to be entirely valid (App. pp. 82, 89-90).

Finally, it found unpersuasive the extraordinary administrative difficulties previously encountered by the Department of the Interior in attempting to distribute an earlier Delaware Claims judgment[11] and rejected, after a short, one-day trial, the possibility that 25 U.S.C. 1291-1297, could be considered a rational Act of Congress.

The District Court, therefore, held the statute to be impermissibly "underinclusive" and enjoined its operation.

THE QUESTIONS ARE SUBSTANTIAL

1. The decision of the majority of the court below presents to this Court a constitutional holding of first impression, and great public importance in the administration of federal Indian law. Chief Judge Daugherty, dissenting below, correctly emphasized that there is not "a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein" (App. p. 83). The holding of the majority below, which disregards this Court's holdings in, *e.g.*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553; *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, and *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209 *affirming*, 244 F.Supp. 808 (E.D. Wash. 1965), by limitation of these cases to their precise facts, apparently establishes, as a rule of constitutional law, the extraordinary principle that the scores of judgments paid to Indian tribes or tribal

[11] 82 Stat. 861, 25 U.S.C. Sections 1181-1186. This is the statute challenged, in part, by appellees as against appellant Cherokee Delaware Class, not as against appellant Absentee Delaware Class and found, by the court below, to be free from any constitutional infirmity.

groupings, pursuant to 25 U.S.C. 70-70v (The Indian Claims Commission Act) and 28 U.S.C. 1505 (the similar Court of Claims jurisdictional statute for post-1951 claims) must be paid only to all those individuals who can demonstrate—by acceptable ethnological proof—that their ancestors were "members" of a particular historic tribe at the "time of the wrong" for which the judgment was entered. The decision also establishes an extraordinary conclusive presumption of "but for" causation as the benchmark of constitutionality for all payments of such judgments—regardless of intervening historical events.

If, as we submit, the unprecedented decision of the majority below is not unquestionably commanded by the Constitution, this Court should unequivocally reverse. The decision calls into constitutional doubt scores of distributions of judgment awards made by Congress to Indian tribes, or tribal groupings, by use of rolls of names, approved membership rosters of present-day tribes, and similar criteria. Two terms past, this Court reversed a similarly unprecedented decision of a three-judge District Court, observing that were it followed "an entire Title of the United States Code (25 U.S.C.) would be effectively erased. . . ." *Morton* v. *Mancari*, 417 U.S. 535, 554. The present case presents the precedent not to erase Title 25 but, worse, to cast it, and its proper constitutional interpretation, into hopeless confusion.

This Court should give plenary consideration to, and explanation of, the question whether the Constitution draws a bright line which Congress cannot cross in enacting Indian claims judgment legislation. The present litigation illustrates the public importance of this issue vividly:

this case arises out of a claim filed with the Indian Claims Commission in 1951; after six opinions by the Claims Commission[12] and two appeals to the Court of Claims,[13] a Final Award was entered by the Commission in 1969. Congress, after lengthy public hearings, enacted the statute now at issue in 1972; it was signed by the President in 1972; from September 5, 1973, until Final Judgment below, the Department of the Interior was restrained from any implementation of the statute by a preliminary injunction issued by the District Court. Now, after the judgment entered by two of the three judges of the court below, appellants are told that they must go back to Congress and seek yet another statute; that the Constitution requires Congress to follow a rule of "lineal descendancy" in enacting any pro rata distribution in such a statute; that Congress violated the Constitution when it departed from a "lineal descendancy" provision—contained in a 1968 Delaware judgment statute—which, in Chief Judge Daugherty's words, created

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[12] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 2 Ind. Cl. Comm. 253 (1953); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 3 Ind. Cl. Comm. 622 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 4 Ind. Cl. Comm. 346 (1956); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 8 Ind. Cl. Comm. 150 (1959); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 1 (1960); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 18 (1969); see also *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 179 (1970); and *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 468 (1971).

[13] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 130 Ct.Cl. 782, 128 F.Supp. 391 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 192 Ct. Cl. 906, 427 F.2d 1218 (1970).

"such problems, turmoil, confusion and delay that these funds have not yet been fully distributed!" (App. p. 86).

Appellants urge that Chief Judge Daugherty is correct; that such an extraordinary exercise in ethnology is not commanded by the Constitution, and that the judgment below should be reversed.

The unprecedented decision below limited to their precise facts, several landmarks of Federal Indian law. The court erred in so doing.

Felix S. Cohen, summarizing what has been, prior to the decision of the majority below, undisputed law wrote:

> An Indian tribe does have power to determine its membership for certain purposes. But this power may be of little importance in some instances because Congress may, by law, provide for an enrollment of members for a specified purpose. In so providing, it may supersede a tribal determination in the administration of tribal property, particularly its distribution among the members of the tribe. Thus, the United States may assume full control over Indian tribes *and determine membership in the tribes* for the purpose of adjusting rights in tribal property. The assumption of power on the part of the Federal Government to distribute tribal funds and land among the individual members of the tribe required the preparation of payment rolls. Several treaties and statutes have authorized the establishment of such rolls and the pro rata distribution of tribal or public property among the enrollees . . . In addition to its ultimate authority to *decide tribal membership*, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may be distributed only to tribal members. Cohen, *Federal Indian Law*, p. 43-44 (Revised Ed. 1958); (Emphasis added; footnotes omitted.).

In summarizing this settled law, Cohen discusses *nine* decisions of this Court. If Cohen's statement is correct, the District Court plainly erred, for its holding would require Cohen to have written:

> An Indian tribe does have power to determine its membership for certain purposes. But this power may be of little importance in some instances because Congress may by law provide for an enrollment of members for a specified purpose *so long as the purpose is deemed by federal district courts to be a proper one and the means chosen by Congress to achieve its purpose are found by a federal district court, after trial, to conform to the ethnological standard of lineal descendancy from the "time of the wrong," disregarding any intervening events.* In so providing, it may supersede a tribal determination in the administration of tribal property, particularly its distribution among the members of the tribe, *provided, that the determination made by Congress does not offend the notions of "fairness" found to be applicable by a federal district court.* Thus, the United States may assume full control over Indian tribes for the purpose of adjusting rights in tribal property. The assumption of power on the part of the Federal Government to distribute tribal funds and land to the individual members of the tribe required the preparation of payment rolls. Several treaties and statutes have authorized the establishment of such rolls and the pro rata distribution of tribal or public property among the enrollees . . . *However, these treaties and statutes must be considered of doubtful validity in light of the decision in Weeks* v. *Kleppe, and there is serious question whether such statutes will, in the future, withstand the rigid "means-ends" scrutiny to which the Delaware distribution statute was subjected in that case, and upon which it was held void.*

> In addition to its ultimate authority to decide tribal membership, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may be distributed only to tribal members, *unless such action is deemed to be repugnant to the "equal protection component" of the Due Process clause of the Fifth Amendment by a federal district court.*

This is not the law of the Constitution today; the decision of the divided court below should not be allowed to make it the law of the Constitution for the future.

No similar statute of the United States, codified in Title 25 of the United States Code, has previously been voided by any Court reviewing the plenary power of Congress over Indian affairs. The substantial public importance of the opinion rendered by the majority below can, thus, hardly be overstated. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 552-553.

2. The majority below refused to consider binding this Court's holding in *Lone Wolf* v. *Hitchcock*, 187 U.S. 550, 565, that "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . ." The District Court, with a series of quotations from *Baker* v. *Carr*, 369 U.S. 186, 210-211, held that, despite *Lone Wolf*, it would proceed with the caution against the "confusion" which may result from application of the "political question" label (App. p. 28). This was plain error. It cannot be ascribed to inadvertence in the face of Chief Judge Daugherty's quotation from *Lone Wolf* and

his comment that *Lone Wolf* "has not been reversed and the decisions following it are too numerous to cite" (App. p. 82). Nor can the District Court's conclusion withstand analysis of *Baker* v. *Carr, supra. Baker* emphasizes, in its discussion of the various aspects of the "political question" doctrine, that:

> "Our discussion . . . requires review of a number of political question cases, . . . Since that review is undertaken *solely* to demonstrate that neither singly nor collectively do these cases support a conclusion that *this apportionment case* is nonjusticiable, we do *not* explore their implications in other contexts." 369 U.S. at 210. (Emphasis added.)

The only comment in *Baker* regarding Indian legislation was limited to "[t]he *Status* of Indian Tribes," 369 U.S. 186, 215 (emphasis added). The observation expressed was that "while it is for [Congress] . . . not for the courts, to determine when the true interest of the Indian require his release from [the] condition of tutelage . . . 'it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe . . .' *United States* v. *Sandoval*, 231 U.S. 28, 46, 58 L.Ed. 107, 114, 34 S.Ct. 1. Able to discern what is 'distinctly Indian'. . . the courts will strike down any heedless *extension* of that label." *Baker* v. *Carr*, 369 U.S. 186, 216-217, *quoting, United States* v. *Sandoval, supra; quoting, Tiger* v. *Western Investment Company*, 221 U.S. 86, 113. (Emphasis added.)

Appellants have no quarrel with this *dictum*.

It does not need argument to demonstrate that no question of *extension* of the plenary power of Congress to non-Indians is remotely implicated by the present statute, and that the reliance of the majority below upon *Baker* for this *dictum* which, in turn, was derived from *dictum* in *Sandoval, supra*, which in its turn, was derived from *dictum* in *Tiger, supra,* none of which involved an issue at all related to the case at bar was manifestly misplaced.

This Court has not, by holding or implication, suggested that the mass of federal case law built upon *Lone Wolf* v. *Hitchcock* was impliedly overruled by *Baker* v. *Carr*, or any other decision. Quite the contrary. By its emphasis upon what was *not* decided in *Baker* v. *Carr*, see *supra*, 369 U.S. 186, 210, this Court was at pains to negate any such implication.

The action of the majority below in disregarding this express limitation, and treating *Baker* as authority for a question it was at pains not to decide, was plainly improper and should be reversed.

At all events, if the holding of *Lone Wolf* v. *Hitchcock* is no longer to be considered controlling law in the federal courts, this Court should set forth the parameters of the rule which will replace it. The assertion of the court below that "case-by-case inquiry" is sufficient in this context (App. p. 28), is untenable. The plenary power of Congress to enact Indian legislation should not be allowed to rest upon the composition of the majority of a three-judge District Court for a particular district. This is especially true since the published precedent of the court below will, if unreversed, have controlling effect in the Western District

of Oklahoma, where a substantial number of Indian tribes, subject to federal statutes reside, and persuasive effect throughout the Tenth Circuit, in which a majority of the Indian tribes in the United States reside.

3. The majority below held that: "the effect of the statute is to create subclasses which are treated unequally . . ." in violation of the Due Process Clause and was, therefore, void (App. p. 43).

The extraordinary importance of this holding, and the magnitude of the error committed by the District Court, is apparent from the District Court's further holding that: "We grant no relief against the Tribes [*i.e.*, the defendant subclasses] or their tribal authorities as such, and our judgment should not be construed as a binding adjudication affecting them. . . " ! (App. p. 27).

This sleight of hand was performed by a majority determined to disregard the holdings of this Court in *Morton* v. *Mancari*, 417 U.S. 535 and *United States Fidelity and Guaranty Company*, 309 U.S. 506.

Morton v. *Mancari*, 417 U.S. 535, 553 n. 24, expressly warned against equating "a 'racial' group consisting of 'Indians' . . . [with] members of 'federally recognized' tribes." *Id.* The *Mancari* Court also reaffirmed "the unique legal status of Indian tribes under federal law . . ." 417 U.S. 535, 551. The District Court ignored the point upon which *Mancari* turned through an improper use of the class action procedures of Rule 23, Fed.R.Civ.P. This misuse of the procedural device of a class action to obtain a substantive result was compounded by employing the same device

to evade the mandate of *United States* v. *United States Fidelity and Guaranty Company, supra.*[14] In words as clear as the English language permits, this Court held in *United States Fidelity and Guaranty Company* that "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without congressional authorization." 309 U.S. 506, 512-513. The court below reduced this holding to a form of words by the device of entering a declaratory judgment against individual members of the Tribe as "representatives" of the Tribe and tribal business committee, *i.e.*, the court-created "Absentee Delaware subclass" (App. p. 27). This evasion of the authority of *United States Fidelity and Guaranty Company* should be reversed. The decision below is flatly irreconcilable with *United States Fidelity and Guaranty Company's* holding that Indian Tribes are exempt from suit without congressional authorization and is an abuse of the procedural device of a class action to obtain an otherwise impermissible substantive result. See, *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156, 177-178.

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[14]The court below stated that no objection was raised to class action procedure (App. p. 10). This is misleading. Appellants filed numerous objections to the jurisdiction of the court, both as to subject matter jurisdiction and upon immunity grounds. The court so admitted (App. pp. 24, 27). Until the court's opinion was handed down, the court had, in no way, intimated that any of these carefully-pleaded objections were to be "resolved" by Rule 23, Fed.R.Civ.P. Again, the record is, as the court admits, replete with objections on the grounds, for the reasons, and upon the authorities cited in this Jurisdictional Statement (App. pp. 24, 27).

The decision below is also irreconcilable with the explicit holdings of the Tenth Circuit in *Tewa Tesuque* v. *Morton*, 498 F.2d 240, 241-242 (10th Cir. 1974), *affirming*, 360 F.Supp. 452 (D. N.M. 1974); *National Indian Youth Council* v. *Bruce*, 485 F.2d 97 (10th Cir. 1973); *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971); and *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957). If unreversed, it is the vehicle which any "unincluded" group of any Indian tribe within the jurisdiction of the Tenth Circuit, and certainly within the jurisdiction of the Western District of Oklahoma may use to urge that any Act of Congress which concerns any particular tribe is to be vitiated for "underinclusiveness," and that long-settled principles of federal Indian law are to be disregarded. A state of affairs will exist within the Tenth Circuit in which the plenary power of Congress to enact Indian affairs legislation will depend upon the composition of a particular three-judge court and whether a majority of that panel chooses to follow the decision below or, *per contra*, the decisions of four unanimous panels of the Tenth Circuit, differently constituted, which handed down the flatly contrary decisions in *National Indian Youth Council* v. *Bruce*, *supra*; *Tewa Tesuque* v. *Morton*, *supra*; *Groundhog* v. *Keeler*, *supra*; and *Martinez* v. *Southern Ute Tribe*, *supra*. The potential for irreconcilable results in cases of great federal importance, depending upon the predilections of the composition of a panel of the Tenth Circuit—or of a three-judge District Court sitting within the Tenth Circuit—is obvious without further argument, as is the necessity for this Court to prevent such a situation by plenary consideration of the questions here presented.

If this Court's holdings are to be overruled, that is a function for this Court alone. But this Court's decisions should not be allowed to be evaded by indirection or by a lower court decision which gives lip service to the form, but ignores the substance, of its holdings. In any event, in an area where Congress' power is plenary, a state of affairs in which the validity of all federal Indian legislation depends upon the composition of a particular three-judge panel is manifestly untenable. See, *Hicks* v. *Miranda*, 422 U.S. 332, 344-345. As in *Hicks*, so here, the district courts are bound by this Court's decisions "until such time as the Court informs [them] that [they] are not. . . ." 422 U.S. at 345, and, as in *Hicks*, the disregard shown for this Court's holdings by the majority below should be reversed, and the authority for this Court's prior opinions reaffirmed.

4. The degree of error in the District Court's substantive misuse of Rule 23 is manifested by its treatment of Section 4 of the statute, 86 Stat. 762, 763, 25 U.S.C. Section 1294(a). This section directs that ten per cent of the funds be distributed to the *tribal governing body* of the Absentee Delaware Tribe of Western Oklahoma for tribal purposes.

Consistently with *United States* v. *United States Fidelity and Guaranty Company, supra; Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957); *Fondahn* v. *Native Village*, 450 F.2d 570 (9th Cir. 1971); and *Baciarelli* v. *Morton*, 481 F.2d 610 (9th Cir. 1973), appellants moved for Partial Final Judgment, Fed.R.Civ.P. 54(b), as to these funds. The motion was denied. The District Court held that 86 Stat. 762, 763, 25 U.S.C. 1291-1297 was void and, without

more, struck this section down (App. p. 22-23, n. 20). This holding—that legislation programming funds from the Federal Treasury *to the Tribe itself* may be vitiated by an injunction upon the complaint of a private party—is so grossly in error that it, alone, requires review and reversal by this Court.

The District Court cited no precedent for its holding, despite its obvious magnitude and its importance for the administration of federal Indian law. This is understandable. There is no precedent. This case should not be allowed to become the first. The importance of this issue to all Indian Tribes which receive tribal program money cannot be exaggerated. Plenary review and unequivocal reversal by this Court are necessary if the orderly administration of tribal governmental expenditures is not to be thrown into a welter of disruptive litigation and conflict. See, *e.g.*, *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971); *United States* v. *United States Fidelity and Guaranty Company*, *supra*.

5. The majority below held 86 Stat. 762, 763, 25 U.S.C. Sections 1291-1297 void because it excluded from its provisions certain persons who argued that they could prove, by ethnological evidence, that they were descendants of persons who had been members of the Delaware Tribe in 1854—the "time of the wrong" for which the Claims Commission judgment was entered (App. pp. 37-41). The court below, in accepting this assertion as ground for voiding the statute held, in effect, that any statute which might replace 86 Stat. 762, 763—or any other judgment statute—*must* allow for an *individualized* hearing for every individual

who alleges ancestry from the ancient Tribe. This holding is inconsistent with the Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 776-785, that requiring "individualized determinations" or "an individualized hearing" as to a non-contractual statutory benefit "would represent a degree of judicial involvement in the legislative function which we have eschewed, except in the most unusual circumstances, . . ." *Id.* at 773. No such "unusual circumstances" are presented here, and the holding of the majority below that the statute at bar is repugnant to the Due Process Clause because it excludes some persons who might prove that they are, ethnologically, descendants of the ancient Delaware Tribe, plainly conflicts with *Salfi's* holding that: "[w]hile it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships [or claims], and of relying on a rule which may not exclude some obviously sham arrangements [or claims], we think it clear that Congress could rationally choose to adopt such a course." 422 U.S. at 781. The statute in the case at bar, like the statute in *Salfi*, does not involve "affirmative governmental action which seriously curtails important liberties cognizable under the Constitution." Both this statute and the statute at issue in *Salfi*, involve only "a non-contractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status, . . ." 422 U.S. at 722, and as to which there is "no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional

concern which they might be expected to produce." 422 U.S. at 785.

The magnitude of the error committed by the majority below in refusing to reach a result in accord with the result this Court reached in *Salfi, supra*, is enlarged by the fact that the decision below calls into question a longstanding substantive policy of Congress in regard to the proper interpretation of the Indian Claims Commission Act itself. That interpretation, *expressly* put before Congress in the legislative hearings which preceded enactment of the statute held void by the District Court, is that: "the Indian Claims Commission Act *requires* that awards be made, *not* to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today." *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971). (Emphasis added.)

In an extraordinary exercise, the majority below quoted this holding and then proceeded to disregard it, apparently (the opinion is none too clear) on the ground that subsequent Court of Claims decisions *may* have modified the rule of *Minnesota Chippewa Tribe*, insofar as *intervention before the Indian Claims Commission itself is concerned*, and, therefore, the rule of *Minnesota Chippewa Tribe* was irrelevant (App. p. 45).

This was a grave error and one of substantial importance for *all* future Indian Claims Commission Act judgment statutes. The decision of the District Court disregards the elementary point that, until entry of the judgment below, no one had suggested that Congress *could not* elect to follow the reasoned interpretation of the Indian Claims

Commission Act set forth in *Minnesota Chippewa Tribe* v. *United States, supra, if Congress so chose.* As Chief Judge Daugherty correctly observed, all courts, including the Court of Claims, have consistently recognized that "how the award is to be paid and precisely who can participate . . . are questions for Congressional and administrative determination." App. p. 85, *quoting, Snoqualmie Tribe* v. *United States*, 178 Ct.Cl. 570, 372 F.2d 951, 957 (1967).

The effect of the decision below is to say that Congress *cannot*, by force of the Constitution, follow the rule laid down in *Minnesota Chippewa Tribe* v. *United States.* Rather, Congress must adopt a Procrustean rule of "but for" causation which conclusively presumes that money payable to a named Indian Tribe as of a date certain, but not in fact paid, would have been in the tribal treasury, rather than expended for some other purpose, a decade or more after the money should have been paid into the tribal treasury. If this sentence seems awkward, it is. But it is the only way in which the remarkable holding of the majority below may be set forth. To illustrate the holding below, we very briefly set forth the facts of the claim here at issue: These are funds which would have been paid to the Delaware Tribe in 1854 *if* the Treaty of 1854 between the United States and the Delaware Tribe had been fair. The holding of the District Court requires Congress to *presume* that these *same* funds would still have been in the Delaware treasury twelve years later, in 1866, when the ancestors of the plaintiff class resigned from the Tribe and took their pro rata share of the tribal assets. The holding below requires Congress to indulge this presumption despite the fact that the 1854 Treaty itself contemplated

expenditure of any and all funds which the Tribe might receive pursuant to its terms, at any time from 1854 forward.[15]

The holding below will, if unreversed, establish the predicate for voiding scores of congressional judgments under the Indian Claims Commission Act heretofore thought wholly consistent with the Due Process Clause. It is an invitation for ethnological splinter groups of any Indian tribe to void an Act of Congress which does not include them within its provisions, even when, as here, they are descendants of a group who formally renounced their tribal citizenship and resigned from the Tribe. Under such a rule, the holding of *Minnesota Chippewa Tribe, supra*, is turned on its head, and *no* statute is constitutionally valid unless it expressly *includes* "individual descendants of tribal members at the time of the taking" !

Under such a rule, the congressional policy of self-determination for American Indian Tribes,[16] as the tribal entities exist today, would be jeopardized. The effect of the injunction below on the portion of the judgment money which was programmed directly *to the tribal governing body itself* is sufficient evidence of the fact. It is equally sufficient evidence of the importance of the question, and of the necessity for plenary review in this Court.

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[15]Article VIII of the Treaty, 10 Stat. 1048, 1051, provided:

> ". . . Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem just and proper."

[16]See, 88 Stat. 77, 25 U.S.C. 1451 and 1452.

6. "*How much* rationale must Congress have in exercising its plenary legislative authority regarding Indian affairs?" (App. p. 89). (Emphasis added.) That crucial question, asked by Chief Judge Daugherty, went unanswered. Judge Daugherty's dissent correctly stated: "Assuming some rationale must be present . . . there is in any event an abundance shown by the record" (App. p. 89). This statement is, we submit, indisputable. Judge Daugherty analyzed the record and observed:

> "Congress had before it another Bill which would have distributed CD 72 and 298 [88 Stat. 762, 763, 25 U.S.C. 1291-1297] funds in exactly the same manner as the wrongful and horrendous distribution made in CD 337 [82 Stat. 861-862, 25 U.S.C. 1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls.*" (App. p. 89). (Emphasis added.)

Judge Daugherty noted the obvious: these facts are surely sufficient to easily demonstrate a rational basis in the record to support the congressional judgment embodied in the statute challenged here (App. pp. 89-90).

But the majority below held the statute at bar to an extraordinarily stringent standard of review. The majority eliminated each of the several proffered—and demonstrated—bases for upholding this statute by demanding rigorous empirical proof that each proffered basis fitted so perfectly with the statutory goals as to eliminate any possible "underinclusion." Not surprisingly, when held to such a standard as that demanded by the majority, the statute was unable

to survive; any judgment statute, other than (perhaps) a pure lineal descendancy statute would have fallen before such an intense standard of "means-ends" review.

For example, the admitted necessity of finding a method of distribution which would avoid the turmoil created by the lineal descendancy provision in the 1968 Delaware judgment statute (82 Stat. 861, 862, 25 U.S.C. 1181-1186), properly described by Chief Judge Daugherty as "horrendous" (App. p. 89), was dismissed by the majority "in view of the admonition of *Stanley* v. *Illinois*, 405 U.S. 645, 656 . . ."! (App. p. 41). The right of a father to a hearing in a child custody proceeding—the issue in *Stanley*—is a far cry from the case at bar, and the reliance upon it is obviously misplaced.

The need to eliminate spurious claims, held to be a decisive governmental interest in *Salfi, supra*, was dismissed on the authority of the singularly ill-favored classification contained in *Jimenez* v. *Weinberger*, 417 U.S. 628, 636, and the gender-based classification in *Reed* v. *Reed*, 404 U.S. 71. The court simply assumed that appellees' constitutional claim under the Due Process Clause was *within* the umbrella of such demanding review as that applied in *Shapiro* v. *Thompson*, 394 U.S. 618, and *Goldberg* v. *Kelly*, 397 U.S. 254 (App. p. 52).

The majority below, applying without heed to Chief Judge Daugherty's powerful dissent, a rigorous standard of strict empirical review, disclaimed, as a matter of form,[17]

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[17]The majority's disclaimer to the effect that it was not applying "strict scrutiny" here should be disregarded. Though claiming not to do so, that, obviously, is what the majority did; a fact sufficiently shown by the cases upon which the majority relied (App. pp. 41, 43, 52).

what it was doing as a matter of substance: subjecting this statute to a standard of review which no statute, state or federal, has yet survived.

Even assuming, *arguendo*, that equal protection review is appropriate to a closed-end distribution statute such as the one at bar, under tradition equal protection standards the statute easily meets the requirement of having "some reasonable basis," *Dandridge* v. *Williams*, 397 U.S. 471, 485, and of drawing lines of distinction based upon a "state of facts [which] reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (citations omitted).

Indeed, in dealing with so extraordinarily complex a question as an acceptable vehicle for judgment legislation to pay for a wrong committed a century and a quarter ago against a group of people long since dead, *Cf. Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 354 (Jackson, J. concurring), the admonition of *Jefferson* v. *Hackney*, 406 U.S. 535, 546-547, that "the very complexity of the problems suggests there will be more than one constitutionally permissible method of solving them" is especially appropriate.

The court below, holding irrelevant the history of enormous problems of fairness, and the administrative chaos, that came in attempting to distribute the 1968 Delaware judgment on an ethnological basis, commanded that Congress justify its policy decision in the 1972 judgment statute with a legislative history so completely convincing and a statutory plan so precisely crafted as to result in no possible "underinclusion." Of course, the judgment statute

subjected to such unprecedented review was unable to bear the enormous burden put upon it; the statute should not have been called upon to bear that burden.

The standard of review to which the majority held the statute at bar directly conflicts with the carefully restrained standard employed in *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 813-814, *affirmed*, 384 U.S. 209. The issues presented to the court below are legally indistinguishable from those presented in *Simmons*. The statute here, like the statute in *Simmons*,[18] served the purpose of providing a statutory definition of those who would be considered members of a tribal group for a particular purpose.

The majority below made no attempt to reconcile its holding with the *Simmons* holding that:

> "It was early held that included in this plenary power of Congress [over Indian affairs] was the power to *regulate and define tribal membership*. In short, Congress, or its delegated agents, had full power to define and describe those persons who would be *treated and regarded as members* of an Indian Tribe and entitled to an enrollment therein." 244 F.Supp. 808, 813 (emphasis added; footnotes omitted).

In support of its holding, the *Simmons* court cited and discussed no less than eleven decisions of this Court. The majority below erred in limiting the broad holding of *Simmons* to its precise facts. The majority below compounded the error by refusing even to discuss its reasons for limiting

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[18]The statute at issue in *Simmons* was, 60 Stat. 968, 25 U.S.C. 607. The statute defined "membership" in the Yakima Tribes on the basis of "enrolled members . . . ." and limited descendable interests from deceased members of the Tribe to those persons defined in the statute.

Simmons to its facts. This error should be reversed. *Cf. Hicks* v. *Miranda*, 422 U.S. 332, 343-344.

The standard of review applied in *Simmons* was that "at some reasonable point a line must be drawn between . . . those properly to be regarded as continuing members of the Tribe [for purposes of the statute at issue] and those who are not." 244 F.Supp. 808, 814. That standard was affirmed by this Court, 384 U.S. 209. Under this criteria for reasonable deference to congressional judgment, there is "an abundance [of rationality] shown by the record" (App. p. 89). (Daugherty, J., dissenting.)

A substantial question affecting the continuing validity of much federal Indian law is presented by the conflict between the carefully restrained standard of review invoked in *Simmons*, and the demand for rigorous empirical justification demanded by the holding of the majority below. This Court should resolve the conflict, and reverse the judgment below.

7. Appellees' complaint alleged, *inter alia*, that the effect of the statute here at issue was to take their property, *i.e.*, the fruits of a cause of action, without just compensation. The District Court, reaching the merits of this claim, rejected it (App. pp. 64-66).

Appellants properly raised with the court below, and briefed at length, the question whether appellees' exclusive remedy (assuming, of course, that their allegation could be proven) lay in the Court of Claims pursuant to the statutory scheme set forth in 25 U.S.C. § 1491 and 25 U.S.C. § 1505. A substantial constitutional question is presented by the action of the District Court in reaching the *merits*

of this claim (even though it was decided against appellees). See, *Hurley* v. *Kincaid*, 285 U.S. 95, and, *Regional Rail Reorganization Act Cases*, 419 U.S. 102.

CONCLUSION

It is earnestly submitted that the action of the majority below in striking down this Act of Congress fails to recognize the authority of controlling decisions of this Court, that the unprecedented holding below presented questions of great constitutional importance in federal Indian law, and that these questions can only be authoritatively decided upon plenary review by this Court.

Respectfully submitted,

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March, 1976

APPENDICES

APPENDIX A

FILED
DEC 18 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crowe; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner, Defendants,	No. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of	No. CIV-74-368-D

the Interior of the United States of America,
Defendant,

THE DELAWARE TRIBE OF INDIANS, and
The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class.).
Intervenors.

Delmer L. Stagner and Stephen P. Friot, Oklahoma City, Oklahoma (Halley, Spradling, Stagner & Alpern, Oklahoma City, Oklahoma, and Henry B. "Boots" Taliaferro, Jr., of Casey, Lane & Mittendorf, Washington, D. C., of counsel, on the briefs) for Plaintiff Weeks

John G. Ghostbear, Tulsa, Oklahoma, for Plaintiffs Frazier and Rattler

Duard R. Barnes, Assistant Solicitor of Indian Affairs, United States Department of Interior, Washington, D. C., and Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma on the briefs) for Defendant Secretary of the Interior

Bruce Miller Townsend, Tulsa, Oklahoma, and Clyde J. Watts, Oklahoma City, Oklahoma (Watts, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, on the briefs) for Defendant and Intervenors, The Delaware Tribal Business Committee, et al

Granville Tomerlin and B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (Tomerlin, High & Patton, Oklahoma City, Oklahoma, on the brief) for Defendant The Absentee Delaware Tribe of Oklahoma Business Committee

JUDGMENT

Pursuant to the findings of fact and conclusions of law appearing in the opinion of the court it is ordered, adjudged and decreed as follows:

1. That this judgment, together with the court's opinion expressing its findings and conclusions, shall determine the rights between the parties to these actions and between the plaintiff Kansas Delaware class, and the defendant Cherokee Delaware class and the defendant Absentee Delaware class, as defined in the court's order entered November 18, 1974, approving forms of class action notice and procedures for giving notice, and the court's orders entered November 1 and 4, 1974, pertaining to class action procedures;

2. That Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, is hereby declared valid and constitutional; that the preliminary injunction entered on March 21, 1974, in Civ-73-586-E, Wanda June Weeks v. United States of America, et al, is vacated as to all restraint against distribution by the defendant Secretary of the Interior, his agents and employees, of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Docket No. 337, and the increments of interest thereon; and that all relief sought by the plaintiffs and the plaintiff Kansas Delaware class in these actions pertaining to said statute, award and judgment funds is denied;

3. That it is adjudged that the provisions of Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, are valid insofar as they provide for the inclusion of the defendant Cherokee Delaware class and the defendant Absentee Delaware class in the distribution of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Dockets Nos. 72 and 298; that, however, said statute makes irrational, arbitrary and unconstitutional classifications for the distribution of said judgment funds in violation of the

Due Process Clause of the Fifth Amendment to the United States Constitution by invalidly excluding therefrom the plaintiff Kansas Delaware class; that the portions thereof making the unconstitutional classifications and exclusion are not severable from the remainder of said statute; that, therefore, the invalid provisions of said statute render it invalid, void, and unenforceable as a whole, as presently enacted; that the judgment funds appropriated to satisfy said award in Dockets Nos. 72 and 298 and the increments of interest thereon are under the control of the Defendant Secretary of the Interior and required to be dispersed and credited pursuant to said distribution statute, unless equitable relief is granted; and that, therefore, the defendant Secretary of the Interior, his agents and employees are enjoined and restrained from distributing and crediting any of the judgment funds appropriated to satisfy said award under the provisions of 25 USCA §§ 1291-1297, and the increments of interest thereon, it being provided that such restraint shall continue only to and until an amendment of the distribution provisions of said statute is enacted and approved, or until a further statute providing for distribution of said funds is enacted and approved.

4. That all other relief sought by the pleadings and motions of the parties, and which is not granted by this judgment, is denied.

s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

ENTERED IN JUDGMENT DOCKET ON DEC. 18, 1975

By: Adelaide Holston, Deputy

[APPENDIX]

FILED
DEC 18 1975
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crowe; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner, Defendants,	No. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of	No. CIV-74-368-D

the Interior of the United States of America,

Defendant,

THE DELAWARE TRIBE OF INDIANS, and The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class.).

Intervenors.

Delmer L. Stagner and Stephen P. Friot, Oklahoma City, Oklahoma (Halley, Spradling, Stagner & Alpern, Oklahoma City, Oklahoma, and Henry B. "Boots" Taliaferro, Jr., of Casey, Lane & Mittendorf, Washington D. C., of counsel, on the briefs) for Plaintiff Weeks

John G. Ghostbear, Tulsa, Oklahoma, for Plaintiffs Frazier and Rattler

Duard R. Barnes, Assistant Solicitor of Indian Affairs, United States Department of Interior, Washington, D. C., and Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma on the briefs) for Defendant Secretary of the Interior

Bruce Miller Townsend, Tulsa, Oklahoma, and Clyde J. Watts, Oklahoma City, Oklahoma (Watts, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, on the briefs) for Defendant and Intervenors, The Delaware Tribal Business Committee, et al

Granville Tomerlin and B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (Tomerlin, High & Patton, Oklahoma City,

Oklahoma, on the brief) for Defendant The Absentee Delaware Tribe of Oklahoma Business Committee

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Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and EUBANKS, District Judge, Western District of Oklahoma

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Memorandum Opinion by Holloway, Circuit Judge, in which Eubanks, District Judge, Western District of Oklahoma, joins; Daugherty, Chief Judge, Western District of Oklahoma, concurs in part and dissents in part

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MEMORANDUM OPINION

These suits challenge the constitutionality of two federal statutes. The first, Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, determines the Indian descendants who may participate in the distribution of an Indian Claims Commission award redressing a wrong by the United States under an 1818 treaty with the Delaware Tribe. 7 Stat. 188.[1] The second statute, Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, performs the same function for a separate Indian Claims Commission award redressing a breach by the United States of an 1854 treaty with the Delawares. 10 Stat. 1048.[2]

Three classes of Delaware Indian descendants are represented by the parties in these cases. The plaintiffs represent a group known as the Kansas Delawares. The defendants represent two groups of descendants known as the Cherokee Delawares and the Absentee Delawares.

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[1]The Indian Claims Commission findings and conclusions in Docket No. 337 concerning the wrong under this 1818 Treaty are reported at 9 Ind. Cl. Comm. 346.

[2]The Indian Claims Commission findings and conclusions in Dockets Nos. 72 and 298 concerning the wrong under this 1854 Treaty are reported at 21 Ind. Cl. Comm. 344.

[APPENDIX]

In 25 USCA §§ 1181-86, relating to the 1818 wrong, Congress devised distributive classifications that permitted descendants in all three classes to share in the award. Invoking the Fifth Amendment Due Process Clause and equal protection principles incorporated by it, and the Just Compensation Clause, the Kansas Delawares challenge the constitutionality of the statute's inclusion of the Cherokee Delawares in these distribution provisions.

In 25 USCA §§ 1291-97, relating to the 1854 wrong, Congress provided distributive classifications that permitted only the Cherokee Delawares and the Absentee Delawares to share in the award. With respect to this statute, the Kansas Delawares challenge the constitutionality of (1) their exclusion from the distributive provisions, specifically under the Due Process Clause and equal protection principles incorporated by it, and under the Just Compensation Clause, and (2) the inclusion of the Cherokee Delawares and Absentee Delawares, invoking the same Fifth Amendment principles.

Plaintiffs seek declaratory, injunctive and mandamus relief against distributions under both statutes.

We find merit in plaintiffs' challenge to 25 USCA §§ 1291-97 as an irrational classification, insofar as the statute excludes the plaintiff class of Kansas Delawares[3] from

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[3]The Kansas Delaware class is reported to be composed of over 600 members (plaintiff Weeks' report on membership filed February 4, 1975). As of February, 1975, it was reported that notification by mail of 496 Kansas Delawares had been achieved (plaintiff Weeks' affidavit of service of notice of class action filed February 26, 1975).

The report to the court on membership of the Kansas Delaware class filed February 4, 1975, states that presently ascertained members whose identities are known total 636. In addition, the February 26, 1975, affidavit of plaintiff Weeks states that, upon receiving additional information from the Secretary as to identities and addresses of additional Kansas Delawares, approximately 42 additional persons were mailed notice, making a total of 678 Kansas Delawares who have been identified.

participating in the distribution of the award in Indian Claims Commission Dockets Nos. 72 and 298, relating to the 1854 wrong, and enjoin the defendant Secretary of Interior from making distribution of funds thereunder. We reject all other contentions of the Kansas Delawares concerning the validity of that statute.

We do not sustain the plaintiff Kansas Delawares' challenge to 25 USCA §§ 1181-86, relating to the 1818 wrong, and vacate the preliminary injunction restraining distribution of the remaining funds of the award in Indian Claims Commission Docket No. 337 redressing that wrong.

The plaintiff Weeks in No. Civ. 73-586-E filed her complaint alleging that this court has jurisdiction of this action "under Article III, Section 2 of the Constitution of the United States, under 28 U.S.C. § 1331 and § 1132, and 5 U.S.C. § 701 et seq." (Complaint para. 14). This three-judge court was convened to hear the case. After an evidentiary hearing we entered a preliminary injunction enjoining the defendant Secretary from distributing any of the funds held by him that were appropriated by Congress to satisfy the judgments in Indian Claims Commission Docket No. 337, dealing with the 1818 wrong, and Dockets Nos. 72 and 298, dealing with the 1854 wrong (with specified limited exceptions agreed to by all parties), pending the final determination of this action.

Plaintiffs Frazier and Rattler in No. Civ. 74-368-D filed their complaint in the Northern District of Oklahoma. Because this case involves substantially the same parties and subject matter, it was transferred to this district and consolidated with No. Civ. 73-586-E pursuant to Rule 42(a) F.R.Civ.P. The same panel was constituted to hear it.

This court sustained a motion to dismiss of the United States on the ground that the action as against the Government was an unconsented suit. Other motions to dismiss and for summary judgment were denied and we certified the

action as against the remaining defendants to proceed as a class action by plaintiff class, the Kansas Delawares, against, *inter alia*, defendant classes, the Delaware Tribe of Indians (the Cherokee Delawares) and the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delawares).[4] No question is raised as to the propriety of the class action procedure.

We will discuss the issues under the following propositions: (1) the historical background; (2) jurisdiction and justiciability; (3) validity of the statutory exclusion of the Kansas Delawares from distribution of the award redressing the 1854 wrong; (4) validity of inclusions of the Cherokee Delawares in distribution redressing both the 1818 and 1854 wrongs, and of the inclusion of the Absentee Delawares in distribution redressing the 1854 wrong;[5] and (5) equitable jurisdiction and remedies. This opinion will constitute our findings and conclusions pursuant to Rule 52, F.R. Civ.P.[6]

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[4]Class action representation in this suit is proper under Rule 23(b)(1)(B) and Rule 23(b)(2), F.R.Civ.P., since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, and since the defendant Secretary and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

[5]As noted, the plaintiff Kansas Delawares do not challenge the inclusion of the Absentee Delawares in distribution of the award redressing the 1818 wrong.

[6]There were numerous objections to the many exhibits offered in evidence at trial. We are citing those exhibits relied on in reaching our findings and conclusions and deny objections to the cited proof. Otherwise it is unnecessary to express evidentiary rulings.

I

THE HISTORICAL BACKGROUND

The Delaware Indians were originally on the eastern seaboard, but by the second decade of the 19th century they were geographically scattered. One group of Indians of Delaware ancestry, the Munsee Indians, had become associated with the Moravian Indians, later known as the Christian Indians, or Christian Munsees, and had settled in Canada. Other Munsees were living with the Stockbridge in New York. This group became known as the Stockbridge Munsee. By 1818, the nucleus of the Delaware Nation was residing principally in Indiana and Ohio. See Senate report accompanying H.R. 16402, S. Rep. No. 1518, 90th Cong., 2d Sess. 8, which contains an historical outline of the Delaware Tribe and the various groups involved here. (Defendants Secretary and Cherokee Delawares' Ex. 4, hereinafter cited as Senate Report).

Several years earlier, in 1793, the Spanish Government had granted a tract of land in Missouri to certain bands of the Delawares in Indiana and Ohio who wished to move beyond the Mississippi. A number of the Delawares moved to this grant, and later, on to Arkansas, Oklahoma and Texas, but the main body of the Tribe remained behind until the Treaty of St. Mary's was made in 1818, 7 Stat. 188 (Findings of fact No. 4 and 47, Ind. Cl. Comm. Docket No. 337, *supra* n. 1, Pl. Ex. 10, Tabs A and P).

Under this 1818 treaty, the Delawares ceded to the United States all their lands in Indiana,[7] and in return the United States agreed to give them land west of the Mississippi (Art. 1, 2). It appears that no Christian Munsees and only some of the Stockbridge Munsees were in residence with the main body of the Delaware Tribe at the time the Indiana lands were ceded by the 1818 Treaty (Senate Report, *supra*, at 8-9).

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[7]The remaining Delaware lands in Ohio were ceded to the United States by separate treaties. No claim concerning those lands is involved here.

The Delawares moved to the Missouri tract where they remained until 1829. In September of that year, the Delawares entered into another treaty with the United States, which was designated as a "supplemental article" to the 1818 Treaty. 7 Stat. 327. Under the terms of this supplemental treaty the Delawares gave up their temporary residence in Missouri and accepted in lieu thereof, as their permanent residence, a reservation in Kansas. This reserve was part payment for the Delaware cession of the Indiana lands, and purported to satisfy the obligation of the United States under the 1818 Treaty to provide the Delaware Nation a permanent home west of the Mississippi (Findings of fact 5 and 6, Docket No. 337). But the trade was grossly unequal. The disparity in value between the Indiana lands ceded by the 1818 Treaty and the Kansas lands received under the 1829 Treaty later became the basis for the judgment rendered by the Indians Claims Commission in Docket No. 337. The statute distributing this award, 25 USCA §§ 1181-86, is one of the two distribution statutes being challenged in this suit.

After the Treaty of 1829 many of the Delawares that had preceded the Tribe into Missouri, and then into Arkansas, Oklahoma and Texas, moved on to the land assigned to them in Kansas. A portion of the members of the Delaware Tribe, however, remained in sections of Oklahoma and Texas. One group of Delawares, on its way from Texas to Kansas in 1853, obtained permission from the Choctaw Nation in the Anadarko area of Oklahoma to stay on its land as tenants at will (Finding of fact No. 48, Docket No. 337). Some of this group subsequently moved to the Kansas Reservation, but the majority remained behind in Oklahoma. These Delawares, together with others from Kansas and elsewhere that later joined them, maintained group identity, having chiefs and a tribal council up to the present time. The descendants of this group, who are now residing among the Wichita and Caddo Indians at Anadarko, Okla-

homa, comprise the defendant class, the Absentee Delaware Tribe of Western Oklahoma, or Absentee Delawares (Finding of fact No. 51, Docket No. 337).

On May 6, 1854, the main body of the Delaware Tribe residing on the Kansas lands entered into a treaty with the United States, 10 Stat. 1048. Under this treaty which was not signed by any representatives of the Absentee Tribe (Defendants' Adm. No. 37, Pl. Ex. 154), the Delawares ceded their lands in Kansas, with certain exceptions, to the United States. These lands comprised the so-called hunting "outlet," extending westward into mid-Kansas, and the "residence lands" (Finding of fact No. 2, Ind. Cl. Comm. Dockets Nos. 72 and 298, *supra* n. 2, Pl. Ex. 10, Tab Q). Of the residence lands, part was reserved to the tribe as a permanent home (Art. 1), and four sections were to be conveyed to the Christian Indians who had since migrated to Kansas and were living with the Delawares in 1854 (Art. 13; Senate Report, *supra*, at 10). The remaining portion of the residence lands, the Delaware "trust lands", was ceded to the United States to be sold at public auction, with the proceeds going to the Delaware general tribal fund (Art. 2, 7); Finding of fact No. 2, Dockets Nos. 72 and 298).

However, in 1856 and 1857 the Government improperly sold the Delaware trust lands. It did not sell the lands at public auction as required by Article 8 of the 1854 Treaty, and as a result the Delawares received far less than they should have from the sale of their lands. (Findings of fact No. 4 and 8, Dockets Nos. 72 and 298). At this time ancestors of the plaintiff Kansas Delawares and of the defendant Cherokee Delawares were residing on Delaware lands in Kansas. The wrongful disposition of the Delaware trust lands in Kansas became the basis for the judgment rendered by the Indian Claims Commission in Dockets Nos. 72 and 298, and underlies the other distribution statute challenged herein, 25 USCA §§ 1291-97.

[APPENDIX]

Pursuant to the Treaty of 1854, the Delawares removed to that portion of the residence lands which the treaty had reserved for them as a permanent home (the "diminished reserve"). Then, by a treaty in 1860, 12 Stat. 1129, the United States agreed to survey the diminished reserve and to allot to each Delaware Indian an 80-acre tract in that reserve (Art. I). In addition, the treaty provided that 80-acre tracts were to be set aside for each of certain Absentee Delawares, approximated to be 200 in number, who were expected to move to Kansas and reassemble with the main body of the tribe in the near future (Art. IV).

In 1866 the Delawares entered into another treaty with the United States, 14 Stat. 793, the purpose of which was to provide for their removal to Indian Country in Oklahoma. The diminished reserve was to be sold by the United States, with the proceeds to be used for the purchase of 160 acres of land in the Indian Country for each Delaware man, woman and child who should remove thereto (Art. IV). However, all adult Delawares were to be given the opportunity under the treaty to elect whether to remove or, instead, to dissolve their relations with the Delaware Tribe and become citizens of the United States (Art. III). Each adult Delaware who thus elected to become a United States citizen was to receive fee simple title to the 80-acre tract allotted him under the 1860 Treaty, his just proportion of the Tribe's credits then held in trust (which included the proceeds of the sale of the trust lands), and also his proportion of the proceeds of the sale of the diminished reserve. Thereafter these persons were to share no further in Delaware property or annuities (Art. IX).[8]

The 1866 Treaty also provided that a registry would be made of the names of all the Delawares who thus elected to dissolve their tribal relations and remain in Kansas (Art. IX). The names of 21 adults and 49 minors appear on such

[8]Article IX of the 1866 Treaty is reproduced in Part C of the Appendix to this opinion.

registry (Pl. Ex. 44). They are the ancestors of the plaintiff class Kansas Delawares.[9]

In July, 1866, the United States and the Cherokee Nation made a treaty which provided for the relocation of civilized Indians on unoccupied Cherokee lands in the Indian country in Oklahoma. Art. IX, 14 Stat. 799. By an agreement in 1867 between the Delawares and the Cherokees (Pl. Ex. 10, Tab I), each individual of the Delaware Tribe who enrolled upon a certain register[10] acquired a life estate of 160 acres of land from the Cherokees (see Delaware Indians v. Cherokee Nation, 193 U.S. 127, 143), paid for by tribal funds,[11] and the right to become members of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and

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[9]Wanda June Weeks, the plaintiff in No. Civ. 73-586-E and representative of the plaintiff class in this consolidated action, established that she is a lineal descendant of one of the original Kansas Delaware Indians. One of the names appearing on the "Article IX Register" is Annie Grinter (Pl. Ex. 44). Annie Grinter was the great-grandmother of Wanda June Weeks (Transcript of Preliminary Injunction Hearing, 20 Pl. Ex. 15; Pl. Ex. 136a). Dorothy Frazier and Ruth Rattler, the plaintiffs in No. Civ. 74-368-D, alleged lineal descendancy through a Kansas Delaware named Lewis Ketchum (Plaintiffs Frazier and Rattler's Complaint, para. 5; Pl. Ex. 44), and established that they shared in the partial distribution of the award in Docket No. 337 (Pl. Ex. 136c and d).

[10]The names of 985 Delawares appear on this register (Defendants Secretary and Cherokee Delawares' Ex. 23, p. 73, 241. They are often referred to as "registered Delawares." The register is referred to as the "1867 Register."

[11]As noted, the 1866 Treaty, 14 Stat. 793, provided that the United States would use the proceeds from the sale of the diminished reserve to purchase the Cherokee lands (Art. IV). Actually, only the lands not allotted to the Kansas Delawares were to be sold.

The diminished reserve consisted of land which was held in severalty in 80-acre allotments and land held in common by the tribe. The 1866 Treaty provided that each Delaware removing to the Indian country

citizens of the Cherokee Nation, but they and their descendants maintained group identity (Findings of fact No. 49 and 50, Docket No. 337).[12] The descendants of this group, who today reside in northeastern Oklahoma, comprise the defendant class Delaware Tribe of Indians, or the Cherokee Delawares.

The minor children of the adult Kansas Delawares did not immediately become United States citizens at the time of their parents' election under the 1866 Treaty. Rather, Article IX of the 1866 Treaty provided that they were to be considered temporarily severed from the tribe until they attained the age of twenty-one, at which time they too could make an election either to become citizens of the United States or remove to the Cherokee Delawares in Oklahoma. Until that time their just proportion of the Delaware tribal annuities was to be paid to their parents for the children's support and education. If thus admitted to citizenship upon reaching majority, such minors were to be

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[11] (Continued)

would receive (in addition to the life estate in 160 acres of Cherokee land) the "value" of his 80-acre allotment in the diminished reserve, plus the "value" of any improvements he had made thereon (Art. III and VI). Apparently the purchase of the Cherokee lands was to be made from the proceeds of the sale of the lands held in common (Art. IV and VI). The residue of the proceeds of the sale of the diminished reserve was to be added to the general Delaware tribal fund (Art. VI), which already contained the proceeds of the sale of the trust lands. And, as previously discussed, each Kansas Delaware was to receive his proportionate share of this fund (Art. IX).

Dockets Nos. 72 and 298 concerned only the improper disposition of the trust lands under the 1854 Treaty, and did not concern this sale of the diminished reserve provided for by the 1866 Treaty. See Findings of the fact No. 2 and 4.

[12] The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares and claim instead that the identity of the Cherokee Delawares was lost as a group when they became absorbed into the Cherokee Nation. We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having tribal chiefs and business committees continuously until the present time.

entitled to "all the privileges and interests herein provided for the head of the family." Art. IX, 14 Stat. at 796.

By an Act approved June 22, 1874, ch. 289, 18 Stat. 146, 175, Congress appropriated funds to pay all the minor children of the adult Kansas Delawares their proportionate share of the money and stocks held in trust by the United States for the Delaware Tribe, and directed the Secretary of the Interior to issue a fee-simple title to the lands allotted them under the 1866 Treaty. By this same Act Congress also declared all such minors to be citizens of the United States, thus eliminating the requirement of an election.[13]

Docket No. 337—25 USCA §§ 1181-86

In 1951 a suit was filed in the Indian Claims Commission by two members of the Absentee Delaware Tribe of Oklahoma on behalf of all the descendants of the Delaware Nation as constituted in 1818 to redress the wrong committed by the United States under the 1818 Treaty. The Commission found that the value of the lands in the Kansas reservation given by the United States in the 1829 supplemental treaty, together with other cash payments and gratuitous expenditures determined to be proper offsets, was insufficient consideration for the Delaware cession of its Indiana lands in 1818. The petitioners were awarded $1,627,244.64 "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." (Final Judgment, Docket No. 337).

By 25 USCA §§ 1181-86 Congress adopted a distribution plan for payment of this judgment entered in Indian Claims Commission Docket No. 337. Section 1181 of that Act provides that persons are eligible to participate in the distribution of the award if, *inter alia*, their name or the name of a lineal ancestor (1) appears on the 1906 Delaware

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[13]The pertinent provision of the 1874 statute is reproduced in Part C of the Appendix to this opinion.

per capita payroll (which covers the Cherokee Delawares); (2) is on or eligible to be on the 1940 constructed base census roll of the Absentee Delaware Tribe; or (3) appears on any available census roll or records acceptable to the Secretary, provided that such claimant shows that he is a lineal descendant of Delawares who were members of the Delaware Nation as constituted at the time of the 1818 Treaty (hereafter the "catchall" clause).[14]

The statute's effect was to permit the Cherokee Delawares, the Absentee Delawares, and the Kansas Delawares to share in the distribution of the Docket No. 337 award. Some of the judgment funds were actually distributed to members of those classes prior to the issuance of our preliminary injunction.[15] Some 1500 Munsee Indians applied

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[14] 25 USCA § 1181 provides in pertinent part:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States.

[15] See Plaintiff Weeks Complaint, para. 15; Defendants Cherokee Delawares' Answer, Twelfth Defense, para. 15; Defendants Secretary and Absentee Delawares' Answer para. 15; Transcript of Preliminary Injunction Hearing, 111, Pl. Ex. 15.

The claims by the Cherokee Delawares were made through the 1906 per capita payroll referred to in § 1181(b). This payroll was compiled for the purpose of distributing $150,000 appropriated by Congress as settlement for twelve lawsuits filed by the Cherokee Delawares against the United States. Act of April 21, 1904, 33 Stat. 189, 222. One of the suits concerned the hunting "outlet" in Kansas that was ceded by the Delawares to the United States under the 1854 Treaty. See United

for payments under the award in Docket No. 337, but were denied participation by the Bureau of Indian Affairs at the area level. Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Indian Affairs, 92d Cong., 2d Sess. 95-96 (March 13, 1972) (Pl. Ex. 6).

The plaintiff Kansas Delawares do not contest the Absentees' right to share in Docket No. 337 relating to the 1818 wrong but they do challenge the inclusion of the Cherokee Delawares in the distribution of this award, as well as that relating to the 1854 wrong, on two Fifth Amendment grounds. Essentially they argue that the inclusion of the Cherokee Delawares in the distribution of the award in Docket No. 337 (1) invidiously discriminates against those persons who are entitled to share in the award (i.e., the Kansas Delawares and the Absentee Delawares), and (2) deprives such persons of their property without just compensation.

Dockets Nos. 72 and 298—25 USCA §§ 1291-97

The Absentee Delawares in Docket No. 72, and the Cherokee Delawares in Docket No. 298, brought separate identical suits in the Indian Claims Commission for a general accounting upon all Delaware treaties with the United States. In previous proceedings the Commission had decided, and the Court of Claims had agreed, that both groups

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[15] (Continued)

States v. Delaware Tribe of Indians, 427 F.2d 1218, 1229 (Ct. Cl. 1970). A number of the Kansas Delawares contended that they were entitled to share in this settlement, but were denied participation on grounds similar to some of those argued in the present case, including *inter alia*, the fact that the 1904 Act (appropriating the funds) directed that payment was to be made only to the "Delaware Tribe of Indians residing in the Cherokee Nation" (33 Stat. 189, 222). See Defendants Secretary and Cherokee Delawares' Ex. 18, Ltr. of 1/25/1905, p. 2; Ltr. of 3/22/1905, p. 2. As a result, the 1906 per capita payroll (also referred to in 25 USCA § 1292(c)(1)) limited the distribution of the settlement to only those Delawares who were descendants of the

were entitled jointly to represent the entire Delaware Tribe.[16] Hence, the two cases before the Commission were consolidated.

Although originally filed as a general accounting, the issue in the case was subsequently narrowed to an accounting for that part of the 1854 Treaty concerning what was known as the Delaware trust lands. It was conceded by the Government, and the Commission found, that in 1856 and 1857 the United States did not carry out the treaty provision calling for the sale of the trust lands at public auction. The principal issue tried was how much additional monies the trust lands would have brought if the treaty had not been breached, and the lands had been properly sold at auction. The Commission determined that amount to be $1,385,617.81. It further found that the plaintiffs were entitled to recover damages of five (5) percent per annum simple interest on the principal sum from April 30, 1857

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[15] (Continued)

original 985 registered Delawares enrolled on the 1867 Register (i.e., the Cherokee Delawares). *Id.*, Ltr. of 8/14/1905, p. 1; Ltr. of 1/12/1906, p. 2.

The Absentee Delawares made their claims under § 1181(c). A 1956 Resolution of the Absentee Delaware Tribe provides that the January 1, 1940 census roll shall be used as the base for determining tribal membership. The "constructed base census roll" was formed by taking the names of persons shown to be of Delaware blood and adding thereto the names of persons, such as brothers or sisters, who were eligible to be on the 1940 census roll but were not listed (Defendants Secretary and Cherokee Delawares' Ex. 4, p. 12).

The Kansas Delawares could not, of course, base their claims under the 1906 per capital payroll. Their ancestors did not remove to the Cherokee lands and did not sign the 1867 Register of Cherokee Delawares. Nor could the Kansas Delawares claim under the Absentees' 1940 census roll. Their claims in Docket No. 337 were and are based upon the "catchall" clause in § 1181(d), since, by historical fact, they are lineal descendants of the Delaware Nation as constituted in 1818.

[16] See Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct. Cl. 1955).

to the date of payment. As of August 31, 1969, the principal sum plus interest totaled $9,168,171.13.[17]

By 25 USCA §§ 1291-97 Congress adopted a plan for distribution of the award entered by the Indian Claims Commission in Dockets Nos. 72 and 298. Section 1292 of the Act provides only two methods by which persons may show they are eligible to share in the distribution: (1) by the 1906 per capita payroll embracing the Cherokee Delawares; and (2) by the 1940 census roll of the Absentee Delawares.[18] These two rolls, identical to those in 25 USCA § 1181(b) and (c), allow only the Cherokee and Absentee Delawares to participate in the distribution of the award in Dockets Nos. 72 and 298. Section 1292 contains no "catchall" provision similar to 25 USCA § 1181(d) that would enable the Kansas Delawares to share in the fund by showing their

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[17]On September 10, 1969, the Indian Claims Commission ordered that

> the plaintiffs shall have and recover of and from the defendant as a final judgment the sum of $9,168,171.13 plus an additional amount of damages measured by simple interest at the rate of 5% per annum on the principal sum of $1,385,617.81 from August 31, 1969 to the date of payment of the principal sum. (Final Award, Dockets Nos. 72 and 298).

[18]25 USCA § 1292 provides:

> The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:
>
> (a) they were born on or prior to and were living on October 3, 1972; and
>
> (b) they are citizens of the United States; and
>
> (c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

lineage from Delaware ancestors who were members of the tribe at the time of the wrong under the 1854 Treaty.[19]

The Kansas Delawares, reported to us as numbering over 600, note 3, supra, challenge their exclusion from § 1292 as an invidious classification in violation of the Due Process Clause of the Fifth Amendment and equal protection principles applied under the Amendment. It is this constitutional claim which we are persuaded to uphold.

The plaintiff Kansas Delawares also challenge their exclusion from distribution under § 1292 on another Fifth Amendment ground—that the exclusion amounts to a taking of their vested rights without just compensation.

Finally, they challenge the inclusion of the Absentee Delawares and the Cherokee Delawares in the distribution of the award, it again being argued that such inclusion discriminates against the Kansas Delawares and deprives them of property without just compensation.[20]

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[19]Despite the restrictive terms of the statute, plaintiff Weeks applied for participation in the award in Dockets Nos. 72 and 298 (Pl. Ex. 136a). Her application was rejected by the Bureau of Indian Affairs, and her appeal therefrom was denied by the Department of the Interior (Pl. Ex. 4).

[20]Section 1294 of the Act divides the Dockets Nos. 72 and 298 funds between the Absentee and Cherokee Delawares on a per capita basis. Ninety (90) percent of the funds apportioned to each of the two groups is to be paid out to individuals on a per capita basis. The other 10% remains to the credit of the governing bodies of each of the respective tribes to be expended for uses approved by the Secretary.

In addition to their other objections to all of the plaintiff Kansas Delawares' claims, the Absentee Delawares have moved for partial final judgment under Rule 54 F.R.Civ.P. as to the 10% of the portion of the award to remain to the credit of the Absentee Delaware Tribe of Western Oklahoma pursuant to § 1294(a). Their position is that the plaintiff Kansas Delawares have waived any claim as to said 10% of the portion of the award remaining to the credit of the Absentee Delaware Tribe, pointing to a letter introduced by plaintiffs, from the Assistant Solicitor for Indian Affairs, Department of the Interior, to

For reasons discussed in Part IV we do not agree with these latter objections of the Kansas Delawares to the inclusion of the Cherokee Delawares and the Absentee Delawares in the distribution of the awards.

We turn from this factual background to the legal issues that are raised.

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[20] (Continued)

plaintiffs' counsel (Pl. Ex. 137). The letter states that approval of attorneys fee contracts is not required on

> the specific understanding that you do not seek for your clients any part of the judgment funds in Dockets 72 and 298 which are reserved for tribal use by . . . 25 U.S.C. § 1291 *et seq*, but rather seek only their participation in the per capita distributions authorized by [25 USCA §§ 1181-86 and 1291-97]. . . .

They also argue that plaintiffs' various instruments filed in this case have not asserted a claim against the 10% portion set aside for the Absentee tribal body.

We are denying the motion for partial final judgment. Regardless of whether such waiver occurred, based on the pleadings of plaintiffs it is clear the Kansas Delawares have challenged the constitutionality of the statute and have asked that we enjoin distribution under it. See Plaintiffs' Brief on Motion for Partial Final Judgment for Absentee Delaware Tribe of Western Oklahoma, at 5 (filed 7/9/75); Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 70, 71 and 73. For reasons stated in Part V of this opinion, we must hold that 25 USCA §§ 1291-97 is not severable, and that the unconstitutional exclusion thereby of the Kansas Delawares renders the statute invalid as a whole.

With respect to the Cherokee Delawares, the position of the plaintiffs is not clear as to the 10% provision in § 1294(b). See Brief of Plaintiff in Support of Motion for Summary Judgment, at 11-12 (filed 4/16/74). Nevertheless, as stated, the plaintiffs do attack the constitutionality of the distribution statute, at least because of their exclusion, and ask that distribution under the Act be enjoined.

In § 1294(b) there is a proviso that the Secretary shall not approve the use of the funds given to the Cherokee Delaware Tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interest of its members. We have been informed by a recent certificate that the Secretary has made such finding with respect to the Delaware Tribal Business Committee. We are asked by the Cherokee Delawares to approve the finding, but that function is not within our issues or appropriate in our disposition and we are denying the motion for this relief.

II
JURISDICTION AND JUSTICIABILITY

By numerous motions the defendants have asserted that this court is without jurisdiction of the subject matter and that only nonjusticiable issues are presented. Essentially they argue that the case does not present a substantial federal question because it involves only an intra-tribal dispute not subject to judicial review. They urge two distinct theories of sovereign immunity. They argue nonjusticiability, claiming that plaintiffs raise only political questions concerning the plenary power of Congress to define Indian tribal membership, and that plaintiffs challenge nonreviewable appropriation statutes. We are not persuaded that the theories bar decision of the merits of the constitutional claims of the plaintiff Kansas Delawares.

Subject Matter Jurisdiction and The Intra-Tribal Dispute Cases

First, defendants assert that there is no substantial federal question presented, arguing that this controversy involves only intra-tribal matters not within the jurisdiction of the court, citing Groundhog v. Keeler, 442 F.2d 674 (10th Cir.); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee 321 F.2d 767 (10th Cir.) and Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), among other cases.

The complaints allege, *inter alia*, that the statutory exclusion of the Kansas Delawares was an unconstitutional and arbitrary deprivation of valuable property rights and a denial of equal protection, depriving plaintiffs of due process in violation of the Fifth Amendment (Plaintiff Weeks' Complaint, paras. 21 and 23; Plaintiffs Frazier and Rattler's Complaint, paras. 13 and 25). These averments and the complaints as a whole present causes of action arising under the Federal Constitution and within the juris-

dictional grant in 28 USCA § 1331. See Baker v. Carr, 369 U.S. 186, 198-99. Defendants challenge jurisdiction, however, contending that the cases cited demonstrate lack of a substantial federal question because only an intra-tribal dispute is involved.

Defendants rely heavily on Groundhog v. Keeler, 442 F.2d 674 (10th Cir.). The court there dismissed a challenge to a chief's appointment under a federal statute authorizing the President to appoint the Principal Chief of the Cherokee Tribe. The court reviewed authorities recognizing "that Congress has exclusive and plenary power to enact legislation with respect to the Indian Tribes." *Id.* at 678. It was concluded that a jurisdictional dismissal was appropriate since the claim was "so lacking in substance and so contrary to well established law" that it afforded no substantial basis for federal jurisdiction, citing California Water Service Co. v. City of Redding, 304 U.S. 252, 255, and Ex Parte Poresky, 290 U.S. 30, 32. See 442 F.2d at 678, n. 7.

We recognize the validity of the conclusion upholding congressional power to authorize the appointment of the chief. However, our cases are not disposed of by such reasoning. We do not find any authority unmistakably sustaining congressional authority to exclude one group of Indian descendants from benefits conferred broadly on others who apparently stand on equal footing. No previous decisions make it clear that the constitutional claims before us are obviously without merit. Levering & G. Co. v. Morrin, 289 U.S. 103, 105.

For similar reasons we find the remaining authorities and arguments unpersuasive as a challenge to jurisdiction. *Martinez, supra,* and *Puckkee, supra,* involved controversies between individual Indians and tribal entities over the official actions of the tribe. The cases are readily distinguishable since the challenges posed there were to a tribal decision or policy, and not to federal statutes. *Martinez* concerned an individual attack on a tribal decision excluding

the plaintiff from tribal membership; *Puckkee* challenged the distribution of an Indian Claims Commission award where the distribution scheme fixed by the tribal council excluded the plaintiffs; and the *Prairie Band* case sought to bar approval of a tribal distribution plan. As the cases involved essentially inter-tribal disputes over decisions by tribal authorities, the courts found no substantial federal question arising under 28 USCA § 1331. See *Martinez*, 249 F.2d at 919; *Puckkee*, 321 F.2d at 770; *Prairie Band*, 335 F.2d at 367. In contrast, this action involves a substantial challenge to congressional rather than tribal action.[21]

We are persuaded that the Kansas Delawares present substantial constitutional claims under the Due Process Clause—claims deserving consideration on their merits. And since we are also convinced that the claims are justiciable, as explained below, we feel the case is properly here under 28 USCA § 1331. See Baker v. Carr, 369 U.S. at 198; see also, Powell v. McCormack, 395 U.S. 486, 512-13.[22]

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[21] Although the controversy here might be denominated one as to "tribal membership" in the broad sense of the term, that alone does not render it an "intra-tribal' dispute. The *Martinez* opinion itself recognized that the question of tribal membership for disposition of funds could, as a result of federal legislation, become a matter of federal rather than tribal supervision. See 249 F.2d at 918, 920.

[22] In their answers defendants deny the jurisdictional amount allegations. However, the objection has not been pressed by argument or brief and we find it without merit.

As discussed above, this case properly proceeds as a Rule 23(b)(1)(B) class action. The decisions in Snyder v. Harris, 394 U.S. 332 and Zahn v. International Paper Co. 414 U.S. 291 impose prohibitions against aggregation of claims in class actions. Those decisions, however, concern Rule 23(b)(3) class actions and present no obstacle to the aggregation of claims when a common and undivided interest is present. Gallegher v. Continental Insurance Co., 502 F.2d 827, 831 (10th Cir.); see also Berman v. Narragansett Racing Association, 414 F.2d 311, 314-15 [1st Cir.), cert. denied, 396 U.S. 1037. Should the plaintiff class of Kansas Delawares prevail in this litigation, their right to share in the benefit of the award will have been determined. Still, a formula will have to be determined by statute and no individual recoveries can be, or are now, sought. See *Berman, supra* at 315-16.

Sovereign Immunity

The defendants' motion to dismiss the suit as against the United States has been granted since there is no consent to such a suit. [Order, Nov. 1, 1974]. The situation differs, however, with respect to the case against the Secretary. The doctrine of sovereign immunity does not insulate federal officers from suit when the case seeks to enjoin threatened action by a federal officer under an unconstitutional statute. See Larson v. Domestic and Foreign Corp., 337 U.S. 682, 690. We therefore rejected the governmental sovereign immunity defense as to the Secretary.

In our Weeks case it is objected that the tribal business committees which are sued are immune from suit. It is true that the Indian Nations are exempt from suit without congressional authorization. United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 512; Turner v. United States, 248 U.S. 354, 358. Nor may a tribe be sued indirectly by suing tribal officers or the United States as trustee or guardian of the tribe. Barnes v. United States, 205 F.Supp. 97, 100 (D. Mont.).

However, the Weeks complaint alleges as to the Cherokee Delaware and Absentee Delaware committees that each of the members of the committee (being separately named) is a Delaware Indian and that they are each a representative of their respective subclasses, the Cherokee Delawares and the Absentee Delawares. The Indian defendants are not immune from suit in their individual capacities. See Chemah v. Fodder, 259 F.Supp. 910, 914 (W.D. Okla.). We feel we may entertain the suit against the individually named Indian defendants, in their individual capacities, and that we may also properly recognize them as representatives for class action purposes under Rule 23(b)(1)(B) and 23(b)(2) and enter a proper declaratory judgment of the right of the individuals constituting the classes. We grant no relief against the tribes or their tribal authorities as such, and our judgment should not be construed as a binding adjudication affecting them.

[APPENDIX]

The Argument of Non-Justiciability and the Plenary Power of Congress Over the Status of Indian Tribes

Defendants argue that only non-justiciable issues are presented due to implication of the plenary power of Congress to define Indian tribal membership.

Without doubt, plenary authority has been exercised by Congress from the beginning over tribal relations of the Indians and the power has been deemed a political one, not subject to control by the judicial department. Lone Wolf v. Hitchcock, 187 U.S. 553, 565; see also National Indian Youth Council v. Bruce, 485 F.2d 97, 99 (10th Cir.). However, we are cautioned that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." Baker v. Carr, 369 U.S. 186, 210-11. As in other contexts, there is no blanket rule as to justiciability where legislation affecting the status of Indians is challenged *Id.* at 215-16. Analysis must be made of the threads of the political question doctrine to determine whether they catch this controversy. *Id.* at 211. Generally, we must first consider whether the constitutional claim presented and relief sought are of the type permitting judicial resolution, and second, whether there may be a "political question" that is not justiciable because of the separation of powers. Powell v. McCormack, 395 U.S. 486, 516-17.

In considering the first question, we note that the constitutional claims essentially are that the distribution statutes violate the Fifth Amendment's protections against unlawful taking and against denial of due process, implicating equal protection principles. See Weinberger v. Wiesenfeld, ___ U.S. ___, 43 U.S.L.W. 4393, 4394, n. 2. Such a claim of discriminatory classification is of a type regularly considered and decided by the courts. As the Court observed in rejecting the non-justiciability argument in Baker v. Carr, 369 U.S. at 226:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Moreover, the relief sought is not unfamiliar. An injunction against threatened unconstitutional action by a governmental officer is within the proper equitable remedies of the court, see Lane v. Pueblo of Santa Rose, 249 U.S. 110, 113-14, and the separate remedy of a declaratory judgment is also familiar. Powell v. McCormack, 395 U.S. 486, 517-18. We are convinced that the first general test of justiciability is satisfied.

Our second inquiry—whether there is a non-justiciable "political question" because of constitutional separation of powers—involves more detailed considerations. We must consider whether there is a bar to judicial disposition because of a constitutional commitment of the issue to a coordinate political department, lack of judicially discoverable and manageable standards for resolving the question, or an impossibility of decision without an initial policy determination of a kind clearly for non-judicial discretion, *inter alia*. See Baker v. Carr, 369 U.S. 186, 217; see also Powell v. McCormack, 395 U.S. 486, 518-19.

Of course, there is explicit constitutional authorization for congressional action in dealing with Indian affairs in the provision for Congress "To regulate commerce . . . with the Indian Tribes." And the functions relating to treaties conferred on the President and the Senate by Art. II, § 2, Cl. 2, have often been the source of power to deal with the Indian tribes. See Morton v. Mancari, 417 U.S. 535, 551-52; McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172, n. 7; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66.

The authority conferred upon the other branches for dealing with the Indian Tribes by treaty is involved indirectly in this case in the sense that the historical background for the Delaware awards in question include several treaties with the Tribe, as discussed earlier. There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function. Instead these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution. There is the additional view that enactments dealing with Indians involve the relationship of a ward to his guardian, and there is an element of such a relationship touched on by § 1294.[23] Baker v. Carr, 369 U.S. 186, 215; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 567. However, the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress.

We have touched earlier on the availability of familiar standards for deciding the constitutional claims presented here. We are persuaded that the claims invoke familiar due process and equal protection principles. In several instances the courts have reached the merits of due process claims of a similar sort. *E.g.*, United States v. Jim, 409 U.S. 80; Ute Indian Tribe v. Probst, 428 F.2d 491, 498 (10th Cir.), cert. denied, 400 U.S. 926; Simmons v. Seelatsee, 244 F.Supp. 808, 815 (E.D. Wash. 1965 (three judge court), aff'd mem., 384 U.S. 209; see also McCurdy v. Steele, 353 F.Supp. 629, 637-38 (D. Utah 1973), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

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[23]We refer to the provision in § 1294(a) and (b) that 10% of the award be withheld for subsequent advancement, expenditure, etc., for any purpose authorized by the tribal governing bodies of the Cherokee and Absentee Delawares and approval by the Secretary of the Interior. 25 USCA §§ 1294(a), (b). This portion of the statute is affected by our decision only because of our conclusion that the distribution statute, which has no separability clause, must be held invalid as a whole. See Parts III and V, *infra*.

Nor do any of the remaining considerations underlying the political question doctrine apply. Decision on the precise constitutional issues does not involve any disrespect for a political decision by a coordinate branch. And, of course, there is no danger of embarrassment by multifarious pronouncements by two branches as in foreign affairs. See Baker v. Carr, 369 U.S. at 211-13, 217.

For these reasons we are satisfied that, on analysis, the political question doctrine does not bar consideration of the constitutional claims of the Kansas Delawares. They may invoke jurisdiction of the court under USCA § 1331 to decide the validity of the statutory exclusion and inclusions in light of established constitutional limitations. "[T]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Tillamooks, 329 U.S. 40, 54; see also United States v. Klamath Indians, 304 U.S. 119, 123; Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375-76; United States v. Creek Nation, 295 U.S. 103, 109-10; Stephens v. Cherokee Nation, 174 U.S. 445, 578; F. Cohen, Handbook of Federal Indian Law 91 (orig. ed. 1942).

The Objection to Justiciability on the Theory of Nonreviewability of Appropriate Statutes

The Absentee Delawares advance a final argument that nonjusticiable questions are involved because appropriation statutes are challenged, relying on United States v. Price, 116 U.S. 43 and United States v. Jordan, 113 U.S. 418. The plaintiff Kansas Delawares reply that appropriation statutes are not involved. They say that the determination to pay the awards was made in earlier, separate appropriation acts, Pub.L. No. 88-635, ch. IX, Oct. 7, 1964, 78 Stat. 1033-34; Pub.L. No. 91-167, ch. IX, Dec. 26, 1969, 83 Stat. 453, and that the challenged distribution statutes are not appropriation acts. Without deciding this point we consider the argument on the basis that the distribution statutes under attack are a part of the appropriation procedure.

We conclude that the reasoning of the *Price* and *Jordan* cases does not apply. The cases involved determinations that restitution should be made for property taken for wartime purposes and by unlawful taxation, respectively. In both cases the government challenged a prior congressional determination by statute of the government's obligation. In *Jordan* the Court stated that the clear import of the statute was that the amount specified had been collected contrary to the tax regulations involved, and that this congressional determination, made on recommendation of the Secretary of the Treasury, could not be challenged in the subsequent suit. 113 U.S. at 423. Similar reasoning was relied on in the *Price* case.

We have also noted Buchanan v. Patterson, 190 U.S. 353; United States v. Louisville, 169 U.S. 249, and Kruszewski v. United States, 163 F.2d 884 (7th Cir.), cert. denied, 333 U.S. 880, which recognize the principles of *Price* and *Jordan*. In none of the cases, however, is there support for the inference that a statute, because it involves an appropriation function, is unreviewable if a substantial constitutional claim is made that an invidious or irrational classification or exclusion is made by the statute. And, of course, the fact that the spending power is involved does not bar consideration of constitutional issues. See Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 62-78 (1936); Veazie Bank v. Fenno, 8 Wall. 533, 541 (1869); cf. Flast v. Cohen, 392 U.S. 83, 127 (Harlan, J., dissenting). We feel that involvement of the appropriation function is no bar to hearing the merits of the constitutional claims of those excluded by a classification asserted to be invidious and irrational.

Thus, we are convinced that substantial constitutional claims are asserted and that they deserve disposition on their merits. The claims are proper for consideration under familiar judicial standards and none of the facets of the political question doctrine bars judicial review.

III

CONSTITUTIONALITY OF THE EXCLUSON OF THE KANSAS DELAWARES BY 25 USCA §§ 1292 and 1294

The plaintiff Kansas Delawares claim that the exclusion barring their participation in the award in Dockets Nos. 72 and 298, redressing the 1854 wrong, is irrational and invidious under the Due Process Clause, and the equal protection principles incorporated therein; and also that the statute takes their vested individual rights without just compensation. We find merit in plaintiffs' first claim, not agreeing however with their unlawful taking theory.[24]

In assessing the claim of the Kansas Delawares that the exclusion amounts to an irrational and invidious classification, we follow equal protection principles applied under the Fourteenth Amendment. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2, Johnson v. Robinson, 415 U.S. 361, 364-65 & n. 4. Since no suspect classification or fundamental interest is involved, our inquiry is whether the classification excluding the Kansas Delawares is rationally related to a legitimate governmental interest, or whether it invalidly excludes a group standing on equal footing with others benefited. Jimenez v. Weinberger, 417 U.S. 628, 636-37; see also Weinberger v. Salfi, ... U.S. ....., ... (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84; McDonald v. Board of Election, 394 U.S. 802, 809.

We approach the question mindful of the presumption of constitutionality that the statute carries. Flemming v. Nestor, 363 U.S. 603, 617. As noted, the award in Dockets Nos. 72 and 298 seeks to redress a wrong to the Delaware

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[24]It is convenient to address plaintiffs' just compensation claim in Part V of this opinion dealing with equitable jurisdiction and remedies.

tribe from the improper sales of tribal lands in 1856 and 1857. Since the excluded Kansas Delawares trace their descendancy from the injured tribe as of that time, a substantial question as to the rationality of the exclusion is raised. We turn, therefore, to the various justifications for the classifications that have been suggested or may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

The defendants argue that there are several justifications that serve as rational bases for the classifications drawn in 25 USCA §§ 1292 and 1294. When the matter was before the Congress the arguments of the Cherokee and Absentee Delawares for the restrictive classifications centered heavily on their objections to claims of the Munsee groups and the delaying effect those claims had caused in distribution of the award in Docket No. 337 relating to the 1818 wrong. Due to the importance of the legislative history and its focus on the Munsee groups, we will first consider the legislative source materials.[25]

The Legislative History and the Munsee Groups

As noted, the Kansas Delawares did share in the award in Docket No. 337, redressing the breach of the 1818 Treaty, by virtue of a catchall provision in the distribution statute including all persons who "are lineal descendants of Dela-

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[25]It is proper to examine the legislative history of a statute to see if it discloses a rational basis for the classifications made by the statute, see, *e.g.*, Richardson v. Belcher, 404 U.S. 78, 82; United States v. Maryland Savings-Share Inc. Corp., 400 U.S. 4, 6, as well as other grounds of justification that may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

This court on its own motion, and with notice to the parties, requested and obtained a legislative history covering the two distribution statutes (25 USCA §§ 1181-86 and 1291-97) involved in this case through the assistance of the Administrative Office of the United States Courts and the congressional staffs. These materials were filed with the clerk of the court for examination and comments by the parties.

ware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 . . ." 25 USCA § 1181(d). Likewise the legislation originally introduced for the purpose of distributing the funds appropriated to pay the award in Dockets Nos. 72 and 298, redressing the breach of the 1854 Treaty, would have included the Kansas Delawares since it proposed to bring current and amend the distribution rolls developed pursuant to 25 USCA § 1181 so as to include all persons who were lineal descendants of members of the Delaware Tribe as it existed in 1854. H.R. 5200, 92d Cong., 1st Sess. §2 (March 1, 1971); S. 1067, 92d Cong., 1st Sess. §2 (March 2, 1971).[26]

However, the bill which was ultimately passed by Congress, H.R. 14267, 92d Cong., 2d Sess. (1972) (as amended), narrowed the distribution provision. The distribution scheme finally enacted followed the scheme for Docket No. 337, 25 USCA § 1181, except for the crucial difference that the third or catchall provision in § 1181(d) which had allowed the Kansas Delawares to share was omitted from § 1292. Only persons who could trace their ancestry to a described 1906 payroll (*i.e.*, the Cherokee Delawares), or whose name or whose ancestor's name was on, or was eligible to be on, the constructed base census roll as of 1940 of the Absentee Delawares, were included under this distribution provision.

We have examined the legislative history relating to this change in the distribution provisions. The change was made after the Cherokee Delawares and Absentee Delawares objected to the distribution provisions in the bills originally introduced. The substitute distribution provision

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[26]The use of the updated roll in H.R. 5200 was recommended by the Department of Interior. See House Committee Report accompanying H.R. 14267, H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6).

which was adopted was essentially that proposed by the two tribal groups.[27]

The Cherokee and Absentee Delawares advanced several reasons to Congress for rejecting the distribution provision in the bills originally introduced and adopting instead their narrower proposal referring to the 1906 roll and the constructed roll as of 1940.[28] The underlying problem, which was cited repeatedly, concerned the Munsee groups. The Munsees were conceded to share common origins with early Delawares in New Jersey, Pennsylvania and Maryland, to whom they were considered related and with whom they formed one cultural group. At least some officials in the Bureau of Indian Affairs had taken the position that certain Munsee Indians should qualify to share in the award in Docket No. 337 under the catchall provision in 25 USCA § 1181 covering all lineal descendants of the 1818 Delaware Nation. The Bureau had indicated that these Munsees might apply for participation in the distribution under this provision and extended various administrative deadlines in

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[27]See Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 31 ff.; (March 13, 1972) (Pl. Ex. 6) [hereinafter cited as House Subcomm. Hearings]; Hearings on H.R. 5200, H.R. 14267 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4 (May 8, 1972) (Pl. Ex. 7).

[28]See *e.g.*, Letter from Bruce M. Townsend, Chairman of the Delaware Tribal Business Committee (Cherokee Delawares), to Congressman Wayne H. Aspinall, Chairman, House Comm. on Interior and Insular Affairs, Nov. 16, 1971, attached to House Subcomm. Hearings, *supra* n. 27, at 9 ff.; Statement of Louis L. Rochmes, Attorney for the Delaware Tribes, March 13, 1972, attached to House Subcomm. Hearings, *supra* n. 27, at 45 ff.; House Subcomm. Hearings, *supra* n. 27, at 10, 14-18, 21-22, 25, 46-49, 71-74 (testimony of Bruce M. Townsend and Louis L. Rochmes); Hearings on H.R. 14267, H.R. 5200 Before the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4-5 (May 10, 1972) (Pl. Ex. 8); Hearings on S. 3113, S. 1067 S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 42-49, 60-61, 69-71 (July 21, 1972) (Pl. Ex. 5) (testimony of Bruce M. Townsend, Harold Pruner and Lawrence Snake).

order to allow the Munsees to make such applications. It appears that some 1500 Munsees ultimately applied to participate in the award in Docket No. 337, that all 1500 applications had been rejected by the Bureau at the area level, and that some 739 were still pending on appeal at the Bureau in Washington at the time of the hearings on legislation to distribute the awards in Dockets Nos. 72 and 298. See House Subcomm. Hearings, *supra* n. 27, at 95-96.

The Cherokee and Absentee Delawares objected that the Munsee Indians, including the Christian Munsees, were not, in fact, descendants of the Delaware Nation as it was constituted in 1818 or in 1854, and that the Bureau's actions in their behalf were unfounded. See House Subcommittee Hearings, *supra* n. 27, at 56-57, 72. Moreover, they objected that there was Bureau solicitation of the Munsees to apply and that subsequent extensions of deadlines for the Munsees' benefit, coupled with the volume of appeals produced when the Munsee applications were rejected, had unreasonably delayed the complete distribution of the funds in Docket No. 337. They argued that the use of similar "lineal descendants" provision in the new distribution act for the award in Dockets Nos. 72 and 298 would lead to a repetition of the Munsee problem and that a precise definition of the identity of those entitled to share in the latter award was therefore necessary. See the Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*. Other reasons for the restriction of the award to the Cherokee and Absentee Delawares were also urged and they are considered below in discussing the various bases said to justify the exclusion of the Kansas Delawares.

The Munsee situation was undoubtedly a major factor in Congress' decision to drop the catchall "lineal descendants" provision in § 1292. However, the legislative history indicates that Congress was never apprised that adoption of the Cherokee and Absentee Delaware proposals for limiting the distribution provisions would have the effect of

excluding a group of people, such as the Kansas Delawares who were unquestionably lineal descendants of the Delaware Nation of 1854, who had lived on the Kansas Delaware lands, and who had not participated in any judgment to another tribe.[29]

As stated, the Congress adopted basically the position of the Absentee and Cherokee Delawares that the award in Dockets Nos. 72 and 298 be divided between their two groups. The committee reports accompanying the pending proposal H.R. 14267 stated that "[t]he Delaware Indians are divided into two groups: the Delaware Tribe, and the Absentee Delaware Tribe of Western Oklahoma." H.R. Rep. No. 1081, 92d Cong., 2d Sess. 1 (May 22, 1972); S. Rep. No. 92-1126, 92d Cong., 2d Sess. 1 (Sept. 14, 1972) (Defendants Secretary and Cherokee Delawares' Ex. 6 and 7 respectively). The House Report states that the recommendations of the Department of Interior (which had proposed up-dating the Docket No. 337 roll to include persons who are lineal descendants of the Delaware Tribe as it existed in 1854) were strenuously opposed by both groups (the

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[29]See the statement by Mr. Rochmes, tribal attorney for the Absentee and Cherokee Delawares in response to questions by the committee (House Subcomm. Hearing, *supra* n. 27, at 78-80), Appendix to this opinion, Part A.

There is evidence in our record that at least some of the Cherokee and Absentee Delawares, themselves, were unaware of the existence of the Kansas Delawares at the time they testified before Congress. Mr. Townsend, the Chairman of the Delaware Tribal Business Committee (Cherokee Delaware) and one of the principal witnesses before Congress urging the adoption of a distribution scheme utilizing only the 1906 and 1940 rolls, testified in the course of this litigation that he was unaware of the existence of the Kansas Delawares, as such, until after the passage of 25 USCA §§ 1291-97, when it was discovered that the Kansas Delawares were precluded from sharing in the award under the statute. Transcript of Preliminary Injunction Hearing, 76, 91, Pl. Ex. 15. Mr. Townsend further testified that he did not think the question of the Kansas Delawares' sharing in the award in Dockets Nos. 72 and 298 was ever brought before or considered by Congress in the course of the legislative hearings on distribution legislation for the award. *Id.* at 82-85.

Absentee and Cherokee Delawares), and that "the Indian position is, in the opinion of the committee, a defensible one." *Id.* at 2. Neither the reports nor the floor proceedings of both Houses disclose further reasons or discussion for the classifications in the statute as enacted. See 118 Cong. Rec. S 15063 (daily ed. Sept. 18, 1972); 118 Cong. Rec. H 8700 (daily ed. Sept. 25, 1972).

From our examination of the legislative history we find that the Congress was specifically requested by the Absentee Delawares and the Cherokee Delawares to delete the catchall provision, and that Congress made the decision in response to the urging of those groups. On the record before us, we find that neither Congress nor its committees were made aware that the limitation of distribution to the two rolls would exclude a group which had lived on the Kansas Delaware lands and which could trace their Delaware descendancy as the Kansas Delawares do.[30] Instead the focus was on the Munsee Indian groups, including the Christian Indians,[31] and paramount consideration was given to the Munsee situation in considering the proposed change in the distribution statute.

While we have no question of statutory interpretation before us making germane the legislative history and intent in the usual context, we nevertheless feel these legislative materials are relevant in connection with defendants' claim that the Congress was aware that the classification would exclude some Indians who could ethnologically claim to be Delawares.[32] It is disturbing that the Congress was apparently not aware of the Kansas Delaware group and we are persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution.

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[30]See Appendix to this opinion, Part B.

[31]See Article 13 of the 1854 Treaty, 10 Stat. 1048.

[32]See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

Suggested rational bases for the exclusion of the Kansas Delawares in 25 USCA §§ 1292 and 1294

We turn to the several justifications advanced by defendants as supporting the rationality of the exclusion of the Kansas Delawares from participation in the award redressing the 1854 wrong.

First, defendants rely on the references in 25 USCA § 1292 to the 1906 Cherokee Delaware roll and the 1940 Absentee Delaware roll. They say that reference to these objective standards in preference to an ethnological standard of lineal descendancy was intentionally chosen to eliminate the possibility of wrongful payment due to deliberate misrepresentations or misunderstanding, to avoid delay, and to eliminate the confusion that had arisen in distribution of the Docket No. 337 award. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, 64. We cannot agree, concluding that the argument will not withstand analysis of the statutes and factual circumstances, or the constitutional protections against discriminatory classifications made clear by the Supreme Court.

We have noted earlier that complaints made to Congress in connection with delay and controversy, among other things, were directed at the Munsees,[33] and not at the Kansas Delawares. The testimony indicated that approximately 300 Kansas Delawares shared in the earlier Docket No. 337 award redressing the 1818 wrong (Transcript of Preliminary Injunction Hearing, 103-04, Pl. Ex. 15), and the legislative history before us reflects no complaints of delay or controversy in connection with the participation by these Kansas Delawares in the distribution of that award.

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[33]See Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*.

Moreover, in response to requests for deadlines to avoid delay, the enactment providing for distribution of the Dockets Nos. 72 and 298 award included limitations of four months for applications for enrollment, 60 days for rejection by the Secretary, 30 days for appeal, and 60 days for determination of an appeal, 25 USCA § 1293. This protection against delay and controversy moots the substance of defendants' arguments. In these circumstances the suggested considerations of administrative convenience cannot support the exclusion of the Kansas Delawares. The arguments must fall in view of the admonition in Stanley v. Illinois, 405 U.S. 645, 656:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

We are also unconvinced by the suggested rationale of avoidance of spurious claims. It is true that §1292 refers to two existing 1906 and 1940 rolls. However, the suggested potential of spurious claims is not eliminated since the standards of entitlement were not confined within the compass of objective records. The Secretary was required by §1292 to prepare a distribution roll of Absentees living on October 3, 1972, who were United States citizens, and who could show that:

> (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware tribe of Western Oklahoma, approved by the Secretary. (25 USCA § 1292(c)(2))

It is clear that under the §1292 criteria an Absentee Delaware could apply for enrollment under §1293[34] and partake in the distribution of the award if he could show that his name or that of his "lineal ancestor" was on or was "eligible to be on" the constructed base census roll as of 1940. Thus it was open to an Absentee to show entitlement by ethnological proof of Delaware blood lines even though neither his name nor that of his ancestor actually appeared on the described roll.[35] This proof is not limited to objective records. Moreover, we note that both Cherokee and Absentee Delawares could show entitlement for §1292 purposes if the name of their "lineal ancestor" was on the described rolls—a showing that again would involve tracing Delaware lineage subsequent to and outside the described rolls.

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[34]Applications are required to be made by § 1293 to an Area Director. The applications are considered by the Secretary under the § 1292 criteria to determine eligibility for listing on the distribution roll of persons entitled to share in the distribution of the award.

[35]The method of preparation of the Absentee "constructed base census roll as of 1940" included listing persons shown to be of Delaware blood who were *eligible* to be on the 1940 roll of Caddos and Absentee Delawares, but were not listed. The method of preparation of the "constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary of the Interior," 25 USCA § 1181(c), is described in the Senate Report accompanying H.R. 16402 as follows (S.Rep. No. 1518, 90th Cong., 2d Sess. 12 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 4)):

> Membership in the Absentee Delaware Tribe is governed by a resolution adopted by the tribe on December 22, 1956, and approved by the Acting Assistant Commissioner on July 30, 1957. The resolution provides that the January 1, 1940, census roll shall be used as the base for determining membership in the tribe. That roll is the census of the Wichita and Affiliated Bands of Indians (Caddo and Absentee Delaware). In constructing the base census roll referred to in section 1(c) of the proposed bill, the tribe has taken from the 1940 roll the names of persons shown to be of Delaware blood and has included the names of persons, such as brothers and sisters, who were eligible to be on the 1940 roll but were not listed. The base roll which has not yet been approved lists 331 individuals. The executive committee estimates that the membership roll as of January 1, 1967, will contain approximately 800 names.

The prevention of spurious claims is recognized as a legitimate governmental interest in connection with classifications. See Jimenez v. Weinberger, 417 U.S. 628, 636. Here, however, as in *Jimenez*, the effect of the statute is to create subclasses which are treated unequally. For example, members of the Absentee Delaware subclass can show entitlement to participate by proof of Delaware lineage, independent of any roll, through proof that an ancestor was "eligible" to be on the constructed base census roll as of 1940, although not listed. But members of the other subclass, consisting of those like the Kansas Delawares, are denied the opportunity to make a showing of entitlement through proof of Delaware lineage in any way on the suggested rationale that the statute furthers the interest of prevention of spurious claims. The rationale is untenable "since the potential for spurious claims is exactly the same as to both subclasses." Jimenez v. Weinberger, *supra*, 417 U.S. at 636.[36]

Thus, in the circumstances before us, we cannot agree that considerations of the avoidance of potential fraud, delay and controversy, or of easing administrative burdens, justify the discriminatory exclusion of the Kansas Delawares. See Jimenez v. Weinberger, *supra*, 417 U.S. at 635-37; Stanley v. Illinois, 405 U.S. 645, 658; Reed v. Reed, 404 U.S. 71, 76.

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[36]The dimensions of the problem viewed from the numbers of the three groups involved do not indicate that the Kansas Delawares would present more difficulties than the other groups. It was testified before us that the Bureau of Indian Affairs has advised that 7,765 Cherokee Delawares and 1,808 Absentee Delawares had been approved for participation in the award at the time of the preliminary injunction hearing in March, 1974 (Transcript of Preliminary Injunction Hearing, 109, Pl. Ex. 15). As earlier noted, it has been reported to us that the identities of approximately 678 Kansas Delawares were known to the plaintiff Weeks (see note 3 *supra*). Approximately 300 Kansas Delawares shared in the Docket No. 337 award, according to the testimony (Transcript of Preliminary Injunction Hearing, 103-04). And, as stated the complaints as to delay were related to the Munsee groups, not to the Kansas Delawares.

Second, it was argued before Congress and the court that a proper reason for limitation of distribution of the award to the Cherokee Delawares and Absentee Delawares is found in the final award of Indian Claims Commission in Dockets Nos. 72 and 298. The argument is that whereas the award in Docket No. 337 was made to "the petitioners on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818", the award in Dockets Nos. 72 and 298 was made to the "plaintiffs," who were the Cherokee and Absentee Delawares.

We cannot agree with the inference drawn from the form of the award. In its first finding of fact in Dockets Nos. 72 and 298 the Commission stated:

> 1. Plaintiffs, Absentee Delaware Tribe of Oklahoma et. al. in Docket No. 72, and the Delaware Tribe of Indians in Docket No. 298, are entitled under the Act of August 13, 1946, 60 Stat. 1049, *to jointly represent the entire Delaware Tribe in its claim against the United States.* (emphasis added)

In addition the opinion of the Commission refers to its earlier determination (2 Ind. Cl. Comm. 253), that "these two groups were entitled jointly to represent the entire Delaware Tribe." 21 Ind. Cl. Comm. 344, 345.

The finding of the representative capacity in which the plaintiff groups brought suit accords fully with the procedure laid out by the Indian Claims Commission Act, 60 Stat. 1049, 25 USCA §§ 70-70v. The Commission's function is defined as hearing and determining claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians" 25 USCA § 70a. This function is basically to identify the injured tribal entity, making plain the time of the wrong and the injured group. Cherokee Freedmen, v. United States, 195 Ct. Cl. 39, 52. "[T]he ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity."

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). In view of the Commission's finding and the procedural scheme we must read the reference to the "plaintiffs" in the Commission's award in Dockets Nos. 72 and 298 as being to them in a representative capacity on behalf of the entire Delaware Nation as compensation for the 1854 wrong.

Defendants offer a related argument that the law requires that awards of the Indian Claims Commission be made to existing Indian tribes and not to individual descendants of the tribe as it existed at the time of the wrong, relying on Minnesota Chippewa Tribe v. Untied States, 315 F.2d 906 (Ct. Cl.). This purported rule of law is suggested as a rational basis for the statutory exclusion. We must disagree, concluding that the Court of Claims decisions do not support the position of defendant.

Before the Congress defendants pointed to statements in Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 913-14 (1971):[37]

> Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendants who are no longer members of the group. (*Id.* at 913)
>
> At least in such proceedings the Indian Claims Commission Act requires that the awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today. (*Id.* at 914)

The court's opinions since *Minnesota Chippewa* make it clear that the Commission's functions are limited to identifying the injured tribal entity, making plain the time of the wrong and the injured group. See Cherokee Freedmen v. United States, 195 Ct.Cl. 39, 52 (1971). The court has

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[37]See the Statement of Mr. Rochmes cited n. 28 *supra*.

stated that the Commission is to leave to the Congress and its agents the decision of the composition of the injured tribe and the designation of those entitled to participate in the judgment. *Id.*

In Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936, 944 (Ct. Cl. 1965), the court discussed the *Minnesota Chippewa* case and others and the Commission's proper function:

> The court held that, since the claim was on behalf of the entity, the award must run to the entity, not to the individual persons or descendants. This was to make it clear, first, that the claim is a group not an individual demand, and, second, that nothing in the Indian Claims Commission Act bars any current member of the represented group from benefiting or requires the inclusion of descendants who are not now such members. Those questions are left open by the Act. The determinations of 'how the award is to be paid and precisely who can participate in an award' remains for Congressional and administrative determination—the Indian Claims Commission Act standing wholly aside from that extra-judicial resolution. Peoria Tribe of Indians v. United States, supra. *The form of the award should not pre-determine the persons who will benefit from the award to the group—as it might do if there were binding references to descendants of past members or comparable individualization of the decree.* (emphasis added)

And in Cherokee Freedman v. United States, 195 Ct. Cl. 39 (1971), the court made clear the limitations on the functions of the Commission and the Court of Claims again:

> A third separate problem in this family of related topics is the composition of the particular entity or group in whose favor an award is made under the Claims Commission Act—whether specific individuals,

classes of persons, or subgroups saying that they are members or components of the prevailing group are entitled to participate in the judgment. Those questions we have consistently held, from the beginning of litigation under the Act, to be beyond the competence of the Commission and this court; they are reserved for Congress or for authorized administrative resolution when the award is paid. (*Id.* at 46)

* * *

We have always taken pains to assure that any group or persons claiming a right to participate (at least colorably) in a judgment under the Act not be totally excluded, either by the form of the award or by the restrictive nature of the entity to which the award goes in name. Since Congress (or its agent) is to settle disputes as to the composition of, or membership in, the group entitled to the money, the Commission's judgment should not bar an individual or entity from urging before the other branches a right to share on the ground of such membership. (*Id.* at 48) (emphasis added.)

* * *

The third protective device is to make clear—as we do now and as the Commission should also do in its final decision—the identity of the injured tribal entity. That is well within the authority of court and Commission under the Claims Commission Act (see McGhee, Yuchi, Red Lake and Pembina Bands, and the other decisions cited supra), and it will be that entity whose composition will be decided by Congress or its designee. (*Id.* at 52)

* * *

The award itself need not say in precise terms that it is for the benefit of the Cherokee Nation "as it existed or was constituted before 1893 (or from 1872-1893)" so long as it is plain that that is the time and

> the group involved. *The other branches of government can then decide the composition of the Cherokee tribe as of that period.* (Id. at 52) (emphasis added.)

See also Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974).

Hence, we are satisfied that the Commission's authority does not extend to designating the beneficiaries of its awards. This is further reason why we feel the Commission did not intend or make a designation of the Cherokee and Absentee Delawares as the beneficiaries of the award in Dockets Nos. 72 and 298, and that its reference to the "plaintiffs" was merely in the sense of their representative capacity of the injured tribal entity. In this case neither the award nor the decisions of the Court of Claims relied on bears on the question of designation of beneficiaries of the Commission's awards; and they may not serve here as a rational basis for the statutory classifications made by Congress.

Third, defendants argue that rationality of the exclusion lies in the fact that the Kansas Delawares gave up any right to share in future Delaware tribal assets by voluntarily electing to sever their tribal membership pursuant to Article IX of the 1866 Treaty with the Delaware Indians, 14 Stat. 793, 796.[38]

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[38]Defendants point to the last sentence of Article IX describing the effect of an election by a Delaware to become a United States citizen:

> There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

Defendants contend that a similar severence of tribal membership and membership rights was made by statute in 1874 (18 Stat. 146,

We are not persuaded that any previous waiver or surrender of rights prejudices the Kansas Delawares with respect to this award. Article IX of the 1866 Treaty expressly provided that any Delaware electing to become a citizen would receive patents and his "just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States." 14 Stat. at 796. Had the United States fulfilled its obligations in good faith under the 1854 Treaty, the Kansas Delawares on electing citizenship would each have received their just proportion of the increased proceeds of the land sales in 1856 and 1857. The award in Dockets Nos. 72 and 298 was clearly intended to redress the injury and diminution of proceeds from those sales.

We find it a strained interpretation of the 1866 treaty to say that the Kansas Delawares waived any rights to share in such a future award as is involved here. The language of the treaty does not impel such a result and there was no showing that the Indian victims were aware of the wrong done them in the sale of the Delaware lands. "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." Choate v. Trapp, 224 U.S. 665, 675; see Antoine v. Washington, 420 U.S. 194,

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[38] (Continued)

175) as to Kansas Delawares who were minors in 1866. (Plaintiffs disagree, arguing that the statute did not have the effect of severing the minors' membership in the Delaware Tribe. However we feel we need not resolve this question in view of our disagreement with the defendants' basic position that adults' or minors' rights in connection with the award in Dockets Nos. 72 and 298 were surrendered or waived by the earlier acts of their ancestors or by the intent of the 1874 statute and the 1866 Treaty provisions.

200; Choctaw Nation v. Oklahoma, 937 U.S. 620, 631.[39] We cannot accept the waiver argument as a justification for the exclusion.

Fourth, it is argued that rationality for the distribution statute may be found in Article 8 of the 1854 Treaty with the Delawares, 10 Stat. 1048, 1050. This provision states that:

> Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

Defendants argue that this reservation of legislative power by the Congress permits the statutory exclusion of the Kansas Delawares from participation in the award.

Again, construing the treaty as the Indians would have understood it, Choctaw Nation v. Oklahoma, *supra,* 397 U.S. at 631, the inference that any use made of this reserved power must be sustained, is unjustified. Article 8 cannot be said to have reserved or conferred power to prejudice Indian rights without regard to constitutional limitations. We have earlier noted that the plenary power of Congress to regulate Indian affairs is subject to constitutional limitations, see United States v. Klamath Indians, 304, U.S. 119, 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n.

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[39] What has been said also disposes of a related point concerning Article IX of the 1866 Treaty. It is argued that Article IX limited the Kansas Delawares to their just proportion of credits *"then held in trust* by the United States (emphasis added), and precludes their asserting any rights thereafter to such funds, including the award here. Again, the inference of a waiver or surrender of a right to future redress by the award is untenable. This treaty provision likewise does not impel such an interpretation, and it would violate the cited long-standing canon of construction of Indian treaties. And, as noted, there was no showing of awareness by the Indians of the wrong.

12 (D. Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.). The provisions of Article 8 likewise may not be construed to reserve a power immune from constitutional limitations.

Fifth, defendants say that the plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. Defendants contend that the provisions of the later statute—here the distribution enactment—superseded prior treaty provisions and statutes, citing, *inter alia*, Choate v. Trapp, 224 U.S. 665, 670-71; Lone Wolf v. Hitchcock, 187 U.S. 553, 566; Thomas v. Gay, 169 U.S. 264; and Ward v. Racehorse 163 U.S. 504. Defendants argue, contrary to plaintiffs' position, that in light of this unilateral power of Congress to amend or modify treaties and statutes, no "vested rights" were created in favor of the Kansas Delawares by the 1866 Treaty. Defendants conclude that any rights of the Kansas Delawares have been lawfully abrogated by the distribution statute, 25 USCA § 1292, under authority recognized in United States v. Jim, 409 U.S. 80, and Gritts v. Fisher, 224 U.S. 640.

We cannot agree with the inferences drawn. The issue is not whether such power is held by the Congress to abrogate treaties or to control distribution of tribal property. Instead, the issue is whether the exercise of power in this area by the distribution statute comports with the safeguards of the Due Process Clause. For we are convinced that the congressional power to abrogate treaties is circumscribed by the limitations in other parts of the Constitution. See United States v. Klamath Indians, supra, 304 U.S. at 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n. 12 (D.Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

Moreover, we feel that the dispute between the parties over whether any "vested rights" were conferred on the Kansas Delawares by the treaties need not be resolved to

dispose of this argument concerning the power to amend treaties. The plaintiffs constitutional claim under the Due Process Clause and equal protection principles need not be grounded on a "vested right." See Shapiro v. Thompson, 394 U.S. 618, 627, n. 6; see also Goldberg v. Kelly, 397 U.S. 254, 262 & n. 8. Regardless of whether the Government was obligated to grant relief for the historic wrong to the Delawares, the relief having been undertaken and the award and appropriation having been made, we feel that the statute drawing classifications is nevertheless subject to due process and equal protection limitations. See *id.*; Griffin v. Illinois, 351 U.S. 12, 18. For even if they have no "vested" or contractual right, the Indian claimants may not be discriminated against by invidious classifications or by classifications having no rational relation to a legitimate legislative goal. See Weinberger v. Salfi, ... U.S. ....., (slip opinion at 20).

Finally, defendants urge that reference to the 1906 and 1940 rolls of the Cherokee and Absentee Delawares, respectively, represents a rational congressional decision to distribute the award to modern day tribal entities and their members, rather than to lineal descendants of the injured tribe as constituted in 1854. Defendants also contend that reference to the described rolls represents a congressional exercise of recognized power to define tribal membership for purposes of the distribution. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 100, 104, 105, 113.[40] We are unable to

[40]In actuality, modern tribal membership of one of the benefited groups, the Absentee Delawares, is not followed in the statutory distribution under 25 USCA § 1292(c)(2). *E.g.*, a person born after July 30, 1957, must have 1/8 Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. See Defendant Absentee Delawares' Ex. 9 and 28. However, for distribution under § 1292(c)(2) such person need only show that his lineal ancestor's name is on or eligible to be on the constructed base census roll of the Absentees as of 1940, in which case he may thus participate in the distribution though he has less than 1/8 Delaware blood.

accept these propositions as a rational justification for the exclusion.

We start from the point that the Indian Claims Commission Act and its underlying policies are neutral, not favoring any particular pattern of distribution of the Commission's awards. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52 (1971). Nevertheless, it must be remembered that the claim is that of the injured ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Bank of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). While in the absence of some provision to the contrary, the right of individual Indians to share in tribal property generally depends on tribal membership, see Halbert v. United States, 283 U.S. 753, 762-63; United States v. Jim, 409 U.S. 80, 82, we are convinced that distribution of awards under the Act for historic wrongs is not controlled by technical rules of ownership, descent and distribution. Distribution is for congressional disposition, consistent with constitutional limitations applied in light of the purposes of the Indian Claims Commission Act, the treaties and the relief the award affords for injury to the ancestral tribe.

In this instance the claim of the Kansas Delawares to participation in the award has the foundation of their descendancy from the tribe injured at the time of the historic wrong. The wrongful sales of the tribe's lands in 1856 and 1857 diminished the amount of the resulting fund which had been established for the benefit of the Delaware "people" by Article 7 of the 1854 treaty with the tribe, 10 Stat. 1048, 1050, as the traty repeatedly makes clear. And further, the Kansas Delawares' position is re-enforced by Article IX of the 1866 treaty with the tribe, 14 Stat. 793, 796, recognizing the Kansas Delawares' right, *inter alia*, on electing to take United States citizenship, to their "just proportion" of the tribal credits then held in trust by the United States—credits that would have included

the proper measure of payment from sales of the trust lands, but for the wrong to the tribe.

The award in question was made to redress that historic wrong to the entire Delaware Tribe under the 1854 treaty, and the Cherokee and Absentees Delawares were representing "the entire Delaware Tribe in its claim against th United States." See Findings of Fact 1, 23 and 24, Dockets Nos. 72 and 298, 21 Ind. Cl. Comm. 344; opinion in said dockets, 21 Ind. Cl. Comm. at 345, 347. The Kansas Delawares are descendants of the injured ancestral tribe and some 300 of them recently shared in the award under the Act in Docket No. 337 for the similar historic wrong of 1818.

In view of the redress which was the goal of the statute and the award, and in view of the Kansas Delawares' standing being equal in the context of that goal to that of the Absentee and Cherokee Delaware groups benefited, Jimenez v. Weinberger, 417 U.S. 628, 637; United States Department of Agriculture v. Moreno, 413 U.S. 528, 537, we cannot sustain the unequal classification and the arbitrary exclusion it makes. Against the history, the statutes and the treaties involved, the designation of the two "modern groups" for exclusive distribution of the award is a discrimination reflecting no policy, but simply arbitrary and capricious action. Baker v. Carr, *supra*, 369 U.S. at 226.

We doubt that the Congress actually intended or realized that exclusion of a group such as the Kansas Delawares would result. But in any event, the resulting unequal treatment rests on no foundation rationally related to a legitimate governmental interest serving the purposes of the Act. Jimenez v. Weinberger, 417 U.S. 628, 636-38; see Weinberger v. Salfi, ___ U.S. ___, ___ (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84.

Giving the statutory classification the presumption of constitutionality as we must, and considering all justifica-

tions for the classification, we nevertheless must hold that the resulting exclusion of the Kansas Delawares violates the fundamentals of due process and equal protection.

IV

VALIDITY OF THE CHALLENGED INCLUSIONS OF THE CHEROKEE DELAWARES AND THE ABSENTEE DELAWARES IN DISTRIBUTION OF THE AWARDS

Plaintiff Kansas Delawares further argue that the Cherokee Delawares are not entitled to participate in the awards in either Docket No. 337 or Dockets Nos. 72 and 298, and that the statutes providing for distribution of both awards, 25 USCA §§ 1181-86 and 1291-92, violate their Fifth Amendment rights insofar as they include the Cherokee Delawares in the provisions for distribution of both awards. Plaintiffs also claim that the Absentee Delawares are not entitled to share in the award in Dockets Nos. 72 and 298, relating to the 1854 wrong. They say that the distribution statute for that award, 25 USCA §§ 1291-97, violates their Fifth Amendment rights insofar as it includes the Absentee Delawares.[41]

We disagree with these positions taken by the Kansas Delawares and conclude that the challenged distribution provisions are valid insofar as they included the Cherokee and Absentee Delawares.[42]

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[41] Plaintiffs do not challenge the right of the Absentee Delawares to share in the award in Docket No. 337, redressing the breach of the 1818 Treaty. See Plaintiffs' Proposed Finding of Fact No. 31; Brief of Plaintiff in Support of Motion for Summary Judgment at 80; Plaintiffs' Reply Brief on Constitutional Issues at 2.

[42] We realize that as a result of our conclusion in Part III that the classifications made are invalid, and our conclusion in Part V that we must hold 25 USCA §§ 1291-97 invalid as a whole, our consideration of plaintiffs' additional challenges to the statute may be viewed as unnecessary. However, because of the desirability of a prompt decision on all of these constitutional issues, and of economy in efforts, we feel we should decide all these claims on their merits.

The Inclusion of the Cherokee Delawares

Plaintiffs first claim that the Cherokee Delawares are Cherokee Indians by blood and hence have no right to share in awards to the Delaware Tribe. They argue that the Delawares who removed to the Indian Territory as contemplated by the Treaty of 1866, 14 Stat. 793, (*i.e.*, the "registered Delawares") became incorporated into the Cherokee Nation under the 1867 Articles of Agreement between the Cherokees and Delawares (Pl. Ex. 10, Tab I).[43] The Kansas Delawares contend that the effect of the 1867 Agreement was to abolish the Delaware Tribe as a political entity, with the registered Delawares individually becoming citizens of the Cherokee Nation and the children of these registered Delawares thereafter born becoming native blood Cherokees, citing Cherokee Nation v. Journeycake, 155 U.S. 196, and Delaware Indians v. Cherokee Nation, 193 U.S. 127, *inter alia*.

Plaintiffs conclude that the Cherokee Delaware class, being composed of present living descendants of children of registered Delawares born after the 1867 agreement, is not a class of persons who are descendants of members of the Delaware Nation as it existed in 1818 or 1854, in terms of Indian tribal ancestry, citing Halbert v. United States, 283 U.S. 753. They argue that the Cherokee Delawares are native blood Cherokee citizens who never acquired any interest in the Delaware tribal claims for the 1818 or 1854

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[43]The Agreement between the Delawares and the Cherokees provided in part as follows:

> On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as Native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

wrongs, and that they are not entitled under any constitutionally permissible rationale, to participate in the awards for either the 1818 or 1854 wrongs to the Delaware Tribe. They challenge the provisions for distribution of the awards to the Cherokee Delawares as invidious discrimination against those entitled to share in the awards, and claim deprivation of property without just compensation in violation of the Fifth Amendment.

We cannot agree that constitutional limitations prohibit distribution of an Indian Claims Commission award to all lineal descendants of the injured tribe. As stated, the claim to redress under the Act is that of the ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Ct. 1974). The function of Congress is to decide the composition of the injured tribe at the time of the wrong. Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 52 (1971). We are convinced that a legislative decision to distribute an award to the lineal descendants of the injured tribe at the time of the wrong, regardless of their current tribal membership status, is well supported, considering the redress which is the goal of the Indian Claims Commission Act.

One ground for plaintiffs' argument is that the award should be treated as tribal property and governed by principles of communal ownership, applied in light of tribal history subsequent to the wrong.[44] We have already concluded

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[44]Essentially, plaintiffs' argument is this: The move to the Cherokee Nation did not abolish the Delaware national fund (which was diminished as recognized by the awards in Docket No. 337 and Nos. 72 and 298). After the 1867 move, the registered Delawares in Oklahoma and the Kansas Delawares were owners of the national fund, and, since this ownership was communal in nature, it could not be devised, transferred or inherited. On the death of the registered Delawares, their ownership interest terminated. The children of the registered Delawares, not being of Delaware blood, but of Cherokee blood, did not inherit from their Delaware Indian parents any interest in the Delaware national

that distribution of awards under the Act, which is for congressional decision, is not controlled by technical property concepts. We are satisfied that the Congress has sound ground for deciding to distribute an award to lineal descendants of the tribe injured by the wrong. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52. And as discussed in Part V, *infra*, we conclude that there are no "vested rights" related to the awards in question which must be observed in the distribution.

Plaintiff Kansas Delawares argue further that all Cherokee Delawares who, pursuant to 25 USCA §§ 991-98, participated in the award in Indian Claims Commission Docket No. 173 of some $14,000,000 to the Cherokee Tribe, are barred by 25 C.F.R. § 101.4 from participating in the awards in question here. The regulation provides in pertinent part that:

> An Indian holding equal rights in two or more tribes can share in payments to only one of them and will be required to elect with which tribe he wishes to be en-

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[44] (Continued)

fund or in any claims which the prior existing Delaware tribe owned for breaches of treaties by the United States. The succeeding generations of descendants of the registered Delawares are also Cherokees, since they must claim through parents who were native Cherokees, the rule being that children belong to the tribe of their parents, not of their grandparents. Halbert v. United States, 283 U.S. 753 (1931). Plaintiffs conclude that the Cherokee Delawares, as Cherokees, have not succeeded to any rights of the prior existing Delaware tribe, and may not share in the national fund or in the claims which have matured into the awards in Docket No. 337 or Dockets Nos. 72 and 298.

We have rejected similar arguments that the distribution of awards, which is for congressional decision, is controlled by technical property concepts. Likewise, such contentions on the legal status of Cherokee Delawares and their rights under laws of descent are not dispositive of the constitutional claims. In any event, we are satisfied that despite the policy arguments against the Cherokee Delawares sharing in both Cherokee and Delaware awards, there was a sufficient nexus between the Cherokee Delawares and the injured ancestral tribe by descendancy for Congress rationally to include the Cherokee Delawares in the distribution of the awards redressing the 1818 and 1854 wrongs.

rolled and to relinquish in writing his claims to payments to the other.

More broadly, plaintiffs maintain that this rule against dual eligibility for tribal benefits is a long standing public policy. See Mandler v. United States, 52 F.2d 713, 714 (10th Cir.); F. Cohen, Handbook of Federal Indian Law, 137 (orig. ed. 1942). In view of these principles the Kansas Delawares assert there is no rational basis for the congressional decision permitting the Cherokee Delawares to share in the award to redress the Delaware wrongs of 1818 and 1854.

We must disagree. By its own terms 25 C.F.R. § 101.4 applies in circumstances where an Indian holds equal rights in two or more tribes and prevents sharing in payments made to two tribes. Even if controlling over the distribution statutes, the policy and regulation may be viewed as inapplicable on the theory that Indians, like the Cherokee Delawares, participating in the awards here are not receiving payments of two tribes, but that the participation in these awards brings compensation based on earlier circumstances when their ancestors were members of another injured tribe—or at least the Congress could rationally so conclude.

But in any event the policy and the regulation may be changed by statute, subject to constitutional limitations which we feel do apply to an exercise of congressional power over Indian legislation. We see no violation of constitutional limitations arising from a change in policy concerning sharing in two tribal benefits.

The Inclusion of the Absentee Delawares

The plaintiff Kansas Delawares further argue that the Absentee Delawares may not be validly included in distribution of the award in Dockets Nos. 72 and 298 redressing the 1854 wrong. They say that the Absentees' ancestors were not with the main body of the Delaware tribe at the time of the 1854 wrong and were not harmed by breach of the 1854 Treaty.[45] Essentially they contend that entitlement to the benefit of a treaty or to compensation for its breach depends on residency with the tribal entity at the time of entering into the treaty and at the time of the wrong, respectively, and on being subject to the obligations of tribal membership, citing Eastern Band of Cherokee Indians v. United States, 117 U.S. 288; McGhee v. Creek Nation, 122 Ct. Cl. 380, cert. denied, 344 U.S. 856; Prairie Band of Potawatomi Indians v. United States, 165 F.Supp. 139 (Ct. Cl. 1958); and Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960). And the Kansas Delawares conclude that the unjustified inclusion of the Absentees in distribution of the award dilutes the interest of those rightfully entitled to such funds and constitutes a taking of their property without just compensation.

We are unpersuaded by the arguments. It is true that Indians who sever their tribal relationship and separate from the tribe lose their right to participate in tribal assets. Miami Tribe of Oklahoma v. United States, 281 F.2d 202, 213 (Ct. Cl. 1960). However, an Indian group absent from a main tribal body at the time of a wrong may still

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[45]Although plaintiffs do not concede that the Absentee Delawares were members of the scattered Delaware Nation in 1854, they contend that even if they were, they were not in Kansas with the main body of the tribe which made the 1854 Treaty and were not residing on the lands which were ceded by the treaty. It is further claimed that those Absentees who did enjoin the main body of the tribe in Kansas prior to 1854 are ancestors of present members of either the Cherokee Delaware class or the Kansas Delaware class.

be recognized by the tribe as retaining tribal membership, and may have a claim to participate in an award redressing a wrong to the tribe. Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct.Cl.1955). Hence it is relevant to consider what the policy of the Delaware Tribe was in 1854 with respect to recognizing a continued relationship with the Absentees.

We feel the historical materials before us are not conclusive as to whether the Absentees were considered by the tribe to have retained their membership at the time of the breach of the 1854 Treaty. The Kansas Delawares rely on historical documents allegedly showing that, as a result of absenting themselves from the main tribal body in Kansas, the Absentees had, by tribal law, ceased to participate in the tribal councils and to have any interest in tribal property.[46] Defendants, on the other hand, point to several treaty provisions and authoritative discussions of Delaware history indicating that the Absentees were recognized as members of the tribe by its main body in 154. See Article IV of the 1860 Treaty between the United States and the

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[46]Plaintiffs cite Pl. Ex. 32 (Letter from John G. Pratt, U.S. Indian Agent, to Thomas Murphy, Supt. of Indian Affairs, July 14, 1868) in support of this proposition. They further allege that the Absentees received no portion of the annuities paid to the main body of the tribe and did not participate in any of the treaty benefits accruing to the main body of the tribe, citing Pl. Ex. 32, *supra*; Pl. Ex. 145-B (Letter from John G. Pratt to Thomas Murphy, Nov. 27, 1866); Pl. Ex. 64 (Letter from A. H. McKisick, Wichita Agent, to Elias Rector, Supt. of Indian Affairs, Oct. 21, 1857, excerpt from Report of the Comm'r of Indian Affairs, 1857); Pl. Ex. 149 (Excerpt from "Registry, Allotment, Valuation, etc., Delaware Diminished Reserve, Treaty, July 4, 1866"). In particular, they argue that the Delaware national fund, into which the proceeds from the sale of the lands under the 1854 Treaty were placed, was paid out per capita to members of the Delaware nation by 1893 and that the Absentees never received any part of such fund.

There was an objection as to authentication of plaintiffs' exhibit 32, cited above, which appears to be good. Nevertheless, even considering the exhibit, our conclusion remains the same in rejecting plaintiffs' arguments in view of the treaty provisions and other documents cited which serve as an adequate and rational basis for the decision of Congress to include the Absentees in the distribution of the award.

Delaware Tribe, 12 Stat. 1129, 1130-31; S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968).[47] Moreover, we note that the Court of Claims found from its examination of the tribal history that "the rule and policy of the Delawares [in 1854] was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe." Delaware Tribe of Indians v. United States, *supra*, 128 F.Supp. at 399.

We feel this view is persuasive, and that the Congress also was entitled to consider it in drawing the distribution statutes, along with the other historical evidence. Thus, although the historical materials are not conclusive, there is support for the position that the Delaware tribe in 1854 recognized the Absentees as members of the tribe. In these circumstances we cannot say the Congress had no rational basis for the inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

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[47]The defendants say the Treaty of May 30, 1860 between the United States and the Delaware Tribe, 12 Stat. 1129, is evidence of such a contemporaneous understanding as to the structure of the Delaware tribe. Article I of that treaty referred back to Article 11 of the 1854 Treaty, 10 Stat. 1048, 1050, which had provided for the possible future survey and individual assignment of the residence lands left to the Delawares under the 1854 Treaty. Article I went on to provide that those lands should now be surveyed "and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres. . . ."

Article IV of the 1860 Treaty, 12 Stat. 1129, 1130-31, went on to make provision for the Absentee Delawares in the following terms:

> Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong (sic) to the nation in common.

Defendants contend that, by this 1860 Treaty, the ancestors of the Absentee Delaware class were recognized as members of the Delaware

V

EQUITABLE JURISDICTION AND REMEDIES

Having concluded that the classifications made in 25 USCA §§ 1291-97 for distribution of the award redressing the 1854 wrong, resulting in the exclusion of the Kansas Delawares, are invalid, it remains to consider the proper remedies and to determine whether other portions of the distribution statute may be upheld and continued in effect. These questions lead us to the remaining disputes between the parties.

First, defendants argue that if plaintiffs' allegations of a taking of their property without just compensation and without due process are true, they may be entitled to recover money from the Treasury and must present their complaint in such a suit in the Court of Claims or in the district courts. They point to 28 USCA §1505 conferring jurisdiction on the Court of Claims to hear Indian claims against the United States; to the Tucker Act, 28 USCA § 1491, granting that court jurisdiction of claims against the United States founded on the Constitution, among other

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47 (Continued)

Tribe with rights co-extensive with all other tribal members. They allege that these rights included full rights to tribal land, annuities, trust funds and interest accruing to the Delawares under former treaties, including the 1854 Treaty.

However, plaintiffs assert that Article IV of the 1860 Treaty was not an offer to allow the Absentees to share in the *Delaware national fund* if they returned, but only an offer of an *eighty acre allotment* to each Absentee if they returned. In any event, plaintiffs urge that the Absentees did not, in fact, return in response to the opportunity offered by the treaty, thus refusing to rejoin the tribe and forfeiting their right to receive land in Kansas. Plaintiffs cite Pl. Exs. 32 and 145-B in support of this contention. Further, plaintiffs argue that the 1860 Treaty is irrelevant because, under the controlling cases, merely being recognized as a part of the tribe or Nation is not sufficient grounds to establish the Absentees' claim to share in proceeds relating to the breach of the 1854 Treaty, citing Prairie Band of Potawatomi Indians v. United States, *supra*, 165 F.Supp. 139; and Miami Tribe of Oklahoma v. United States, *supra*, 281 F.2d 202.

things; and to jurisdiction conferred on the district courts by 28 USCA § 1346 to hear such claims for amounts not exceeding $10,000. Defendants argue that the only constitutional question presented is whether the challenged statutes have deprived plaintiffs of their resort to those forums; that there is no such foreclosure of remedies to recover by actions at law there; and that injunctive relief and invalidation of the statute would therefore be improper, citing Regional Rail Reorganization Act Cases, 419 U.S. 102; United States v. Causby, 328 U.S. 256; and Hurley v. Kincaid, 285 U.S. 95. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 71-75.[48]

We feel that reliance on Regional Rail Reorganization Act Cases, *supra*, is misplaced. The case involved admittedly existing property rights of the rail companies, their owners and claimants against the bankrupt estates. The Court defined the major issues as being whether an action at law under the Tucker Act will be available to recover any deficiency of constitutional dimension in compensation for the takings allegedly to be effected by the Act, and if the Tucker Act remedy is available, whether it is adequate. 419 U.S. at 121. The Court held that the Tucker Act remedies were not withdrawn, and that they were adequate to recover compensation for any "constitutional shortfall" resulting from conveyances required and, therefore, that the Regional Rail Reorganization Act was not an unconstitutional reorganization plan. *Id.* at 154-55.

However, the case involved no question of the existence of obvious property rights or vested rights of the various parties, *id.* at 122, 137, and the Tucker Act remedy was held available for monetary recovery for any inade-

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[48]Defendants argue that plaintiffs could maintain a class action in the Court of Claims under procedures analogous to those under Rule 23 F.R.Civ.P. See Quinault Allottee Association v. United States, 453 F.2d 1272 (Ct. Cl.). Thus they say no multiplicity of suits and no other like inequitable result would occurr by litigation in that forum, or in a district court suit under 28 USCA § 1346.

quacy in compensation under the Act's reorganization procedures. On the contrary, we feel that here the plaintiffs have no property or vested right in the Indian Claims Commission award in question and, hence, no remedy to recover specific monetary compensation on behalf of any plaintiff or the class of Kansas Delawares. As explained earlier, while we uphold the plaintiffs' claim under the Due Process Clause and equal protection principles incorporated by it, that constitutional claim grounded on irrational classifications is available without the premise of property or vested rights in the award.[49] We do not feel that plaintiffs have any such property or vested rights in the award as may premise a constitutional claim entitling them to specific monetary recovery under the Tucker Act. As pointed out below, after the award is entered Congress subsequently determines the beneficiaries of the award and there may not be a constitutional claim for monetary recovery with respect to the award as entered. Cf. United States v. Jim, 409 U.S. 80, 83.

For like reasons United States v. Causby, 328 U.S. 256, and Hurley v. Kincaid, 285 U.S. 95 are not in point, since they also involved admittedly existing property rights whose taking was compensable by recoveries against the United States.

Since we conclude that the plaintiffs here have no property or vested rights in the award, we feel that they have no remedy at law for specific monetary recovery under the Tucker Act, although they do have a good claim for protection against the irrational statutory classification and exclusion. We are persuaded we should consider and

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[49]Defendants argue that the Court of Claims does give plenary consideration to claims of arbitrary and invidious discrimination, relying on Fredrick v. United States, 507 F.2d 1264, 1266, (Ct. Cl.), saying that all claims of plaintiffs must be put before the Court of Claims. Again, however, the *Fredrick* case involved a claim of a statutory right to employment and monetary recovery which distinguishes it from our case where no such rights in the award exist.

uphold that constitutional claim on its merits and grant equitable and declaratory relief, there being no full and adequate remedy at law and no reason to avoid a prompt decision. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585; see Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 780.

Our conclusion that the plaintiffs here have no vested or property rights in the award, as they claim, is based on the special procedures of the Indian Claims Commission, discussed earlier. Under those procedures the Commission's awards determine only the identification of the injured tribal entity, making plain the time of the wrong and the injured group, and do not pre-determine the persons who will share the award; later the Congress determines the composition of the injured tribal entity and the beneficiaries of the award. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 48, 51-52. In addition, the Congress decides on procedures for the subsequent distribution and whether portions of the fund should be held in trust for the Indians' benefit. *E.g.*, 25 USCA §§ 1293 and 1294. In light of these undecided points remaining for congressional decision after entry of the Commission's awards, it seems clear that no individual or class property right attaches or vests in the Commission's award as entered, such rights depending on later congressional determination.

Finally, we must determine the proper disposition to make in view of our conclusions concerning the validity of the distribution statutes. Of course, since the Act distributing the award redressing the 1818 wrong is being upheld, the interlocutory restraint affecting the remaining portion of that award should be vacated, and we will grant a declaratory judgment of the validity of 25 USCA §§ 1181-86 and deny all other relief sought in connection with the award in Docket No. 337 which that statute distributes.

We have concluded that the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97,

contains irrational classifications, resulting in an invalid underinclusion. Jimenez v. Weinberger, 417 U.S. 628, 637. In such circumstances there are two general alternatives: the court may declare the statute invalid as a whole, or it may extend its coverage to include those aggrieved by the exclusion. See Welsh v. United States, 398 U.S. 333, 361 (Harlan, J. concurring); Moritz v. Commissioner of Internal Revenue, 469 F.2d 466, 470 (10th Cir.), cert. denied, 412 U.S. 906. While in some cases involving a deeply imbedded policy there are compelling reasons to make the "necessary statutory repairs," Welsh v. United States, *supra*, 398 U.S. at 366, extending the coverage of the statute and saving its validity, we feel that we may not do so here.

There is no separability clause in the statute. The absence of such a clause may not foreclose the exercise of discretion to the end that the legislative provisions may be repaired and saved. *Id.* at 366. Here the difficulty with repair is that the remainder of the statute does not contain general provisions easily adaptable to an extension of the statute's coverage. See Moritz v. Commissioner of Internal Revenue, *supra*, 469 F.2d at 470. Moreover, even if repairs by an extension of coverage were possible, we cannot confidently say that Congress would have intended the continued operation of the remaining parts of the statute—such as the provision for withholding 10 percent of the awards in trust—if it had known that the statute would have to be subjected to an extension of its distributive provisions to include the Kansas Delawares.

In view of these difficulties and the absence of a separability clause, we conclude we should follow the general presumption that is observed where a separability clause is not provided, and hold the statute invalid as a whole. See Carter v. Carter Coal Co., 298 U.S. 238, 312. This disposition will permit further congressional consideration of a desired distribution enactment as a whole, free of the invalid exclusion.

In sum, we conclude that we should adjudge the statute distributing the award redressing the 1818 wrong, 25 USCA §§ 1181-86, valid in all respects. The preliminary restraint against distribution of the remainder of that award will be vacated, and all relief sought by the plaintiffs with respect to that award will be denied. With respect to the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97, we are entering our decree declaring that the provisions including the Cherokee Delawares and the Absentee Delawares in the distributive scheme are valid, but that the classifications drawn and the resulting exclusion of the Kansas Delawares render this distribution statute invalid as a whole, and we restrain distribution by the Secretary under that statute.

We find and conclude that there is a case of actual controversy within the jurisdiction of the court, appropriate for entry of a declaratory judgment determining the rights and legal relations of the parties and classes involved. The funds appropriated to satisfy the award in Indian Claims Commission Dockets Nos. 72 and 298, and the increments of interest thereon, are under the control of the Defendant Secretary and his agents and employees, and are required to be distributed and credited pursuant to the distribution statute which we hold invalid. Unless equitable relief is granted, such distribution and crediting will occur and irreparable harm to the plaintiffs and the plaintiff Kansas Delaware class will result. Therefore declaratory and equitable relief should be granted in connection with said award, as provided in our judgment.

Since our earlier orders were entered denying motions, and the filing of answers to the complaints, several additional motions have been filed by the parties for additional relief. We conclude that these motions should all be denied for lack of merit or because our conclusions and our decree render all necessary and proper relief.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

APPENDIX

A

In the transcript of the hearing before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, the following remarks appear between Mr. Pruner, a member of the Tribal Council for the Absentee Delaware Tribe; Congressman Edmondson of the Subcommittee, who presided; and Mr. Townsend of the Delaware Business Committee for the Cherokee Delawares, (House Subcomm. Hearings *supra* n. 27, at 78-80):

> Mr. Pruner. To clarify that one point further, Myrtle Holder and Exendine are members of our tribe—
>
> Mr. Edmondson. They did not sue in that capacity, they sued in the capacity as class litigants for the Delaware Nation.
>
> Mr. Pruner. Yes.
>
> Mr. Edmondson. I can understand Counsel's reason for having drafted it that way, because he wanted a provision that would cover the waterfront. And he got it covered with the judgment. *Of course we have the task of defining just who the Delaware Nation in 1854 included, in addition to what you have before us here today as Plaintiffs representing the two Oklahoma groups.* And I for one am certainly ready and willing to exclude anybody who is a member of the Delaware

Nation of 1854 who went elsewhere and participated in a judgment as a member of another tribe. *But I have some difficulty about a person who is a descendant of that Delaware Nation of 1854 who went elsewhere and has not affiliated with another tribe and participated in a judgment from another tribe.* It poses a problem for me as a very biased Oklahoman on the subject. And I think you will probably have more trouble with non-Oklahomans than you do with Oklahomans.

Mr. Rochmes. *Mr. Chairman, we do not think there are any such. We know the Bureau maintains there are. We think that all those people either are on those rolls or are eligible for the rolls at the very times at which the rolls were made.*

Mr. Edmondson. If you do not think there are any you would have no objection to our including as an eligible person who can prove he is a lineal descendant of someone who was a member of the Delaware Nation in 1854, and who had not participated in any other tribal judgment?

Mr. Rochmes. I think you would have to draft tougher standards than that, because the Bureau people have already made it known to us that they intend to include people who we think clearly are not Delawares and were not part of the Delaware Nation as of that time.

Mr. Edmondson. Then they would have to prove that they are descendants of Delawares.

Mr. Rochmes. Yes. But the Bureau is already saved [sic] with the proof, as for example, that the Christian Munsees were Delawares as of this time. And we think the evidence which saves [sic] them would not save [sic] a court and would not save [sic] you, perhaps. (emphasis added)

B

Defendants point to several statements in the legislative history which they rely on as showing that Congress was aware that it might be eliminating some lineal descendants of the 1854 Delaware Nation in enacting the narrower provisions of 25 USCA § 1292. The first is contained in the Statement of Louis L. Rochmes, tribal attorney for the Cherokee Delawares group, (attached to the House Subcomm. Hearings, *supra* n. 27 at 45 ff).

That Statement reads, in part, as follows:

> This statement is submitted in support of the [Cherokee and Absentee Delaware] tribes' position on H.R. 5200.
>
> In substance that position is that the bill should provide for the division of the funds between the two tribes, to the exclusion of non-Delawares.
>
> Discretion to effect another division has been requested by the Bureau of Indian Affairs . . . The Bureau proposes to conduct a search among the Stockbridge-Munsee Community of Wisconsin for those descendants of the "Emigrant New York Indians" who, it is asserted, "were Delawares who had previously absented themselves from the main body of the tribe" *and also to search for others who, it is hypothesized, "may also be descendants of members of the Delaware Nation in 1854."* These are suppositions not based on fact. I was associated with counsel for the plaintiffs in the Emigrant New York Indian case, and am familiar with the evidence adduced in that case. . . . There was no evidence of Delawares among the Emigrant New York Indians. . . .
>
> Even if these suppositions were based on fact, they would not justify the Bureau's position. The Indian Claims Commission Act is intended expressly for the benefit of existing Indian tribes, bands and other iden-

tifiable groups, and a search for individual descendants who may have elected to change their tribal affiliation is unwarranted. . . .

* * *

The Delaware tribes are particularly concerned with an opinion expressed by Bureau representatives. . . . This is the opinion that a group of Munsee Indians living in Kansas, sometimes known as the Christian Indians, sometimes as the Christian Munsees, and more recently as the Chippewa Munsees, are entitled to be regarded as Delaware for the purpose of sharing in Delaware judgment funds, and particularly in Dockets 72 and 298. (emphasis added)

Defendants point to the mention of "others" who may also be descendants of members of the Delaware Nation in 1854. However, Mr. Rochmes states thereafter that the supposition that there are any "other" such descendants "is not based on fact." The statement as a whole focuses on the question of the possible inclusion of various Munsee Indians in Dockets Nos. 72 and 298, while making no reference to the Kansas Delawares or any group of lineal descendants of true members of the Delaware Nation in 1854 who might be excluded from the judgment by deletion of the "lineal descendants" provision. Mr. Rochmes' testified later before the House Subcommittee on Indian Affairs, to which this statement was made, that all true descendants of the Delaware Nation of 1854 who had not affiliated with another tribe or participated in a judgment to another tribe would be covered by the distribution provision proposed by the Cherokee and Absentee Delawares. See Part A of this Appendix.

A second statement to which defendants refer is contained in a letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Caspar W. Weinberger, Director, Office of Management and Budget, dated September 28,

1972, which states the views of the Department of the Interior on H.R. 14267. That letter discusses the differences between H.R. 14267 and H.R. 5200 and, in regard to H.R. 14267's reliance solely upon the 1906 and 1940 rolls, states: "Although, unfortunately, they [the two rolls] do not include a few Delaware descendants who do not reside in Oklahoma, we consider them to be acceptable rolls." We note however, that this letter was written after H.R. 14267 had passed both houses of Congress to give the Department of the Interior's recommendation as to whether the President should approve the bill.

Third, defendants point to a report written by the Department of the Interior which was included in the House Report accompanying H.R. 16402 (the bill for distribution of the award in Docket No. 337), wherein the Department stated (H.R. Rep. No. 1555, 92d Cong., 2d Sess. 3-4 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 3)):

> There are also other individuals who are lineal descendants of members of the Delaware Nation as it was constituted in 1818, but who was not presently affiliated with either of the Oklahoma Delaware groups. Some we believe, are affiliated with the Stockbridge-Munsee Community in Wisconsin and *others are not affiliated with any tribal group under federal supervision.* In view of the amalgamation of the Delawares with other Indians and the many unique and complex problems encountered in identifying the ultimate beneficiaries of this award, a brief history of the Delaware Nation is enclosed. (emphasis added)

We cannot agree that this earlier, 1968 Departmental reference to "others" (i.e., other lineal descendants not affiliated with any tribal group) served as any notice to Congress of the existence of the Kansas Delawares, especially in view of the fact that the history the Department attached to its report dealt extensively with Munsee affiliations.

In its history the Department stated (*Id.* at 10):

> The *majority* of Delaware Indians who moved on to the Kansas reserve remained until 1867. By the terms of an April 8, 1867, agreement concluded between these Delawares in Kansas and the Cherokee in Oklahoma, the Delaware removed to Indian territory and reside today as Cherokee Delaware in northeastern Oklahoma. (emphasis added)

From this and other exhibits defendants request a finding that:

> Congress was aware, from 1968 forward, that the appropriation and distribution legislation which it enacted to pay the Final Awards of the Indian Claims Commission in *both* Indian Claims Commission Docket No. 337 and Indian Claims Commission Docket No. 72 and 298, would not provide payment to every person who could claim to be, ethnologically, a 'Delaware'. The Department of Interior's Report to Congress, a part of the legislative history of House Report No. 1555, 90th Congress, 2d Sess., the Report which accompanied H.R. 16402, the Bill which eventually became Public Law 90-508 (25 U.S.C. 1181-86) (Sec. Of Int. and D.T.I. No 3) reflects that the Bill would provide for payment to the 'majority' of modern-day Delaware Indians.

Defendants' Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

We are not persuaded that the 1968 or 1972 legislative history, or both combined, support such an inference or indicate any awareness that the 1972 statute (25 USCA §§ 1291-97) would exclude a group such as the Kansas Delawares who were lineal descendants of the 1854 Delaware tribe.

Defendants also cite the House Committee Report accompanying H.R. 14267, (the bill for distribution of the

award in Dockets Nos. 72 and 298) and emphasize the statement therein that (H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6)):

> The recommendations of the Department [of the Interior] regarding the preparation of the updated roll [of those who had participated in the Docket No. 337 judgment] were not adopted by the committee because they were strenuously opposed by both of the Indian groups concerned, and *the Indian position is, in the opinion of the committee, a defensible one.* (emphasis added)

However, as stated above, it does not appear that the House Committee was aware that the "Indian position" it termed defensible would result in the exclusion of lineal descendants of persons who were members of the Delaware Tribe in Kansas in 1854.

Finally, defendants have pointed to the following colloquy between Senator Bellmon and Mr. John O. Crow, then Acting Commissioner of the Bureau of Indian Affairs, which occurred during the course of the Senate subcommittee hearings on distribution legislation for the award in Dockets Nos. 72 and 298, at which Senator Bellmon presided:

> Senator Bellmon. As you know, I am from Oklahoma and I am aware that both Delaware groups oppose S. 1067, but favor H.R. 14267, which was approved by the House. Can you give me your reasoning for favoring S. 1067 or H.R. 14267?
>
> * * *
>
> Senator Bellmon. Do you know the basis for the objections to S. 1067?
>
> Mr. Crow. I think the tribal delegates can tell you much better than I. However, I think that the primary

difference, perhaps, is in the definition of persons excluded from sharing in the judgment.

Senator Bellmon. Do you have any information as to how many would be excluded under H.R. 14267 that would have been included in S. 1067?

Mr. Crow. *It is most difficult to say. We think the number would be quite small. We can't see any possibility of it being more than 200 people.*[50]

Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 38-39 (July 21, 1972) (Pl. Ex. 5). Defendants assert that this colloquy demonstrates that both the Senate and the House were aware that the distribution statute would not include all possible Delaware claimants.

We note Senator Bellmon's question to Mr. Crow further in the same hearing. *Id.* at 40.

Senator Bellmon. If the Congress were to take action which excluded the *non-Oklahoma Delawares* from sharing in this judgment, do you see any possible future legal implications for the federal government? (emphasis added)

Mr. Crow. Mr. Chairman, I don't.

Subsequent testimony by tribal delegates in the same hearing makes it clear that the impression was that the persons that would have been included by S. 1067 (to which Mr. Crow made reference, *supra*) and the "non-Oklahoma Delawares" that were being considered for exclusion (to which Senator Bellmon made reference, *supra*) were the Munsee Indians.

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[50]It will be recalled that S. 1067 would have updated the Docket No. 337 roll to include lineal descendants of the Delaware Nation as it existed in 1854. H.R. 14267 was essentially the bill enacted.

Mr. Townsend. Mr. Chairman, I am Bruce Miller Townsend, Chairman of the Delaware Tribal Business Committee. To my right is Mr. Lawrence Snake who is President of the Absentee Delaware Tribe of Western Oklahoma. . . .

* * *

When S. 1067 was first introduced into the Senate of the United States, there were problems at that time that were latent and did not come to the fore until a later time. They didn't take very long. *Id.* at 42.

* * *

The crux of the matter is the difference between the departmental report, as Mr. Crow has stated, his inclusion of a foreign group of Indians in Delaware matters, that is the Munsee Tribe, and the various names by which it goes. *Id.* at 44.

* * *

Senator Bellmon. . . .

Only one further question. This is the tough one, I am sure, for all of you. But if Congress moves ahead to approve legislation along the lines of the House-passed bill, which would exclude *the non-Oklahoma Delawares, the Munsees,* from sharing in its present judgment, do you foresee any future legal implications for the federal government? (emphasis added)

Mr. Townsend. Mr. Chairman, I am an attorney at law and I don't know that this gives me any greater insight than anybody who is not an attorney, but my way of knowledge—if there has been any legal problem that could face the Bureau of Indian Affairs, it would be a puppy that they brought home and has grown into a ferocious beast by now.

I say this by reason of the fact that any problems that could be brought out in the way of litigation has been fostered, promulgated, by the unilateral action of

the Bureau. I can see none, but there have been these 1,552 applications filed. The Bureau beat the bushes to get them filed and, as far as whether or not any of those people would be interested in instituting litigation, I would say that based upon their track record the chances are nil.

I say that because of the fact that they did not respond to my brief in 1966. They did not respond any further than discussing the matter with their counsel subsequent to that time. No one was present at the House of Representatives Subcommittee on Indian Affairs hearing in 1968. No member of the Munsee Tribe was present at the House Subcommittee hearing last November which was passed over into this March. No members of the Munsee Tribe, nor did they have representatives at those meetings or the March meeting before the House.

Of course, anyone can go to a lawyer, draw up a paper and call it a lawsuit, but I don't think this is what your question implies. I don't foresee the possibility of a meritorious lawsuit in this matter.

Senator Bellmon. Mr. Snake.

Mr. Snake. Mr. Chairman, I am of the same opinion. Since all of these claims have been in hearing, we have never to this date had any Munsee to testify. So I am of the same opinion that there would not be any lawsuit. *Id.* at 69-71.

C

Article IX of the 1866 Treaty (14 Stat. 793, 796) provides:

Article IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens

of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore

provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

The Act of 1874 (18 Stat. 146, 175) appropriated an amount for payment of interest on the Delaware general fund, then added:

For this amount, to enable the Secretary of the Interior to pay to the children of the Delaware Indians who became citizens of the United States under the provisions of the ninth article of the Delaware treaty of July fourth, eighteen hundred and sixty-six, and the children of Betsey Zeigler, who died before completing her citizenship under the provisions of said article, their proportionate share of the money and stocks held in trust by the United States for the Delaware tribe of Indians, fifty-four thousand five hundred and fourteen dollars and twenty-three cents, of which twenty-one thousand four hundred and forty-eight dollars and seven cents shall be deducted from the

money-credits of said tribe, and thirty-three thousand and sixty-six dollars and sixteen cents, to be taken equitably from their several kinds of stock, shall be transferred to the Secretary of the Treasury and become the property of the United States: Provided, That if the Secretary of the Interior shall so determine, the whole amount hereby appropriated shall be taken from the money-credits of the tribe, the Secretary of the Interior to designate the funds from which said amounts shall be taken: Provided, That in the case of deceased persons, the Secretary of the Interior shall make payment to their legal representatives; and said Delaware children are hereby declared to be citizens of the United States, with all the rights, privileges, and immunities of such; and the Secretary of the Interior is hereby authorized and directed to cause patents to issue in fee-simple to said persons for the lands allotted to them; and in case of the decease of any of said persons, the said patents shall issue in the names of such deceased persons, including the said Betsey Zeigler, and the title to the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life; and the Secretary of the Interior shall cause patents to be issued in fee-simple in the names of Barbara Zeigler, Martha Zeigler, Samuel Ketchum, Nathan S. Tiblow, and Francis H. Grinter, who belonged to the families of the citizen class, and who died prior to the census of said Indians made by the agent under the provisions of the treaty of July fourth, eighteen hundred and sixty-six, for the lands allotted to them; and the lands designated in such patent shall enure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life.

DAUGHERTY, District Judge concurring part and dissenting in part:

I concur in part and dissent in part. I concur in that part of the majority opinion which results in upholding the distribution of funds ordered by the Congress in 25 U.S.C. §1181-6 and rejecting Plaintiffs' attacks thereon. However, I must dissent to that part of the majority opinion which declares the distribution of funds ordered by the Congress in 25 U.S.C. §1291-7 to be void and unconstitutional.

PLENARY POWER OF CONGRESS

I consider such distribution of funds to the Indian Tribes and members on their rolls as ordered by Congress in 25 U.S.C. §1291-7 to be within the plenary power of Congress in relation to Indians and not justiciable. In *Lone Wolf* v. *Hitchcock*, 187 U.S. 550, 49 L. Ed. 299, 23 S.Ct. 216 (1903) it was held:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

This case has not been reversed and the decisions following it are too numerous to cite. However, as late as 1973 our Court of Appeals in *National Indian Youth Counc., Int. Ind. Sch. Chap.* v. *Bruce*, 485 F. 2d 97 (Tenth Cir. 1973) held:

> "District courts are also without jurisdiction when confronted with non-justiciable political questions, such as determining the status of Indian tribes. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This court has recognized the plenary

power of Congress to control and manage the affairs of its Indian wards. Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949), cert. denied 336 U.S. 968, 69 S.Ct. 941, 93 L.Ed. 1119 (1949); Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931)."

Also see *Groundhog* v. *Keeler*, 442 F. 2d 674 (Tenth Cir. 1971).

Congress did not have to create the Indian Claims Commission, 25 U.S.C. §§70 et seq., to allow Indians to present claims for redress for past Government wrongs. Nor was Congress required to appropriate and distribute funds regarding a final award recommended by the Commission. Congress by provisions in the Indian Claims Commission Act reserved unto itself the matter of determining the distribution to be made of appropriated funds in payment of awards recommended by the Commission. All of this is pursuant to the unique plenary authority of Congress over Indians. It is therefore my belief that the attacks made herein on the distribution of funds to Indians as ordered by the Acts of Congress involved herein are non-justiciable. I have not found a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein.

TREATY PROVISIONS

In addition, the Treaty itself, which is the foundation of Plaintiffs' alleged rights, gives full authority and discretion to Congress in the matter of the distribution of funds derived from the land sales when it provides in Article 8 in part as follows:

> " * * * and *in distributing the funds to the (Delaware) people*, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, * * * but *Congress*

may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem *just and proper.*" (Emphasis added)

Thus, Congress had treaty authority with the Delaware Nation (as well as plenary power) to use its wisdom in the distribution of the funds involved herein to the Delaware people.

APPROPRIATED FUNDS

Furthermore, I am unable to discard the proposition urged by the Defendants that the Acts of Congress under attack are appropriations of public funds within the meaning of Article 1, Section 9, Clause 7, United States Constitution, and as such may not be redesignated by the Courts under the pronouncement of *United States* v. *Price*, 116 U.S. 43, 29 L.Ed. 541, 6 S.Ct. 235 (1885). This early case and those following it teach that no discretion is vested in the Secretary of the Treasury "or in any Court" to determine the correctness of either the amount or the designee of a payment ordered by an Act of Congress. Congress by 25 U.S.C. §70u reserved unto itself exclusive power to distribute, or to decline to distribute, the appropriated funds necessary to pay any final award recommended by the Indian Claims Commission. The majority opinion has the effect of ordering a redesignation of the recipients of appropriated funds from those designated by the Congress.

RATIONALITY

Also, there is the matter of whether there is rationality in the Acts passed by Congress which the majority strikes down. Ordinarily, determination and classification laws are upheld if there is a rational basis for the same. *United States* v. *DePugh*, 266 F. Supp. 453 (W.D. Mo. 1967), affm'd.

393 F.2d 367 (Eighth Cir. 1968, cert. den. 393 U.S. 832.[1] At one point in this litigation I agreed (without abandoning my position regarding the plenary power of Congress, the provisions of the Treaty involved granting Congress full power regarding the distribution of funds pertaining to the sale of the Indian lands and that the funds here distributed by Congress are an appropriation of public funds) to hear evidence and arguments and receive Briefs on the rationality question. As I read the majority opinion it turns on an alleged lack of rationality or lack of a rational basis for the Congress to exclude the so-called Kansas Delawares from the distribution of funds ordered by 25 U.S.C. §1291-7. I find in the record an abundance of rationality to support the distribution of funds made by Congress in these Acts and do so differently than in 25 U.S.C. §1181-6.

The Indian Claims Commission is without authority to fix the distribution to be made of their recommended awards. See 25 U.S.C. 70r as to the contents of the final determination of the Commission. "How the award is to be paid and precisely who can participate * * * * * are questions for Congressional and administrative determination." *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct.Cl. 570, 372 F. 2d 951 at page 957 (1967); *Peoria Tribe of Okla-*

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[1]This case provides:

"This Court is governed by the fundamental rule of statutory construction that a presumption of validity attaches to an Act of Congress, and that such presumption is not lightly overcome. See, United States v. National Dairy Corp., 372 U.S. 29, 32. 83 S.Ct. 594, 9 L.Ed. 561 (1963) rehearing denied 372 U.S. 961, 83 S.Ct. 1011, 10 L.Ed. 2d 13; McMahon v. City of Dubuque, Iowa, 255 F.2d 154, 160 (8th Cir. 1958) cert. den. 358 U.S. 833, 79 S.Ct. 53, 3 L.Ed. 2d 70. So long as a rationally sound basis exists for the congressional determination or classification, that determination is within the constitutional power of Congress. Egan v. United States, 137 F.2d 369, 375 (8th Cir. 1943), cert. den. 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; Stutz v. Bureau of Narcotics, etc., 56 F. Supp. 810, 813 (N.D. Calif. 1944). It is a matter of legislative judgment. See, Kentucky Whip and Collar Co. v. Illinois Central Railroad Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937)."

homa v. *United States*, 169 Ct.Cl. 1009 at page 1011-12 (1965). But the fact is that the Commission nevertheless recommended or at least suggested to whom their recommended awards in both CD 337 and CD 72 and CD 298 shou'd be distributed. In CD 337 the Commission announced the idea of a distribution to individuals who could establish requisite Delaware blood entitlement and did so notwithstanding the obvious fact that the lands involved were tribal lands and not individual lands.[2] Congress adopted or followed this suggested distribution in its appropriation and distribution enactments and such problems, turmoil, confusion and delay ensued that these funds have not yet been fully distributed! In CD 72 and 298 the Commission recommended or suggested (and again the Congress followed the same) that the funds be distributed to the two recognized Tribes of Delaware Indians and members on their rolls which is what the Commission should have recommended or suggested and the Congress should have done in CD 337. It is believed fair to conclude that this change in attitude about distribution in both the Commission and the Congress came from the problems which resulted from the earlier distribution and the realization that it was wrong. This is a rational basis for the decision of the Congress exercised in enacting 25 U.S.C. §1291-7. But there is more rationality.

The so-called Kansas Delawares on the one hand and the Cherokee (or Oklahoma) Delawares and the Absentee Delawares on the other hand over a hundred years ago came to a parting of the ways. The Delaware Indian Nation ceded their lands in Kansas, moved to Oklahoma from Kansas, affiliated with the Cherokee Nation in Oklahoma and the Caddo-Wichita Indian Tribe in Oklahoma, its individuals maintained Indian citizenship, and they have main-

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[2]Public lands and public funds of Indian Tribes are tribal properties and are not held in individual ownership. *Minnesota-Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 315 F.2d 906 (1963).

tained tribal recognition and organization for over 100 years. On forty-one (41) occasions since removal to Oklahoma Congress has recognized these Oklahoma Delaware Tribes in legislative measures. The so-called Kansas Delawares stayed in Kansas, individually took an allotment of tribal land in Kansas in fee with power of alienation, individually took their proportionate share of trust funds held by the Delaware Tribe, took United States citizenship, renounced Delaware citizenship, obtained provisions allowing their minor children to take United States citizenship (which eventually occurred) and fully divorced themselves from the Delaware Tribe which left Kansas for parts in Oklahoma. This most significant turn of events affords a rational basis for the Congress to distribute the award recommended by the Commission regarding tribal lands to these recognized Delaware Tribes and to those on the rolls of these recognized Delaware Tribes, took land in Kansas, their share of tribal funds and became United States citizens. In *Miami Tribe of Oklahoma* v. *United States*, 281 F. 2d 202 (Ct. Cm. 1960) it is held:

> "The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309-312, 6 S.Ct. 718, 29 L.Ed. 880; Prairie Band of Potawatomi Indians v. United States, Appeal No. 2-57, decided July 16, 1958, 165 F. Supp. 139, 143 Ct. Cl.—(slip opinion, pp. 12 and 20)."

And it seems to me that the majority overlooks another significant distinction which is present with reference to the distribution made by Congress in 25 U.S.C. §1181-6 (which the majority upholds) and the distribution made by Congress in 25 U.S.C. §1291-7 (which the majority de-

clares to be unconstitutional and void as possessing no rational basis) which provides rationality for the later distribution being different from the earlier distribution. The distribution made in 25 U.S.C. §1181-6 pertained to the sale of Delaware lands in Indiana. The distribution made in 25 U.S.C. §1291-7 pertained to the sale of Delaware lands in Kansas. After ceding the lands in Indiana the Delawares moved to Missouri and thence to Kansas. None stayed in Indiana, none took an allotment of land in Indiana in fee, none took their proportionate share of tribal funds and none took United States citizenship. The Delawares in Kansas maintained tribal identity. Whereas, when the Kansas lands were ceded a vastly different turn of events ensued as above pointed out and which will not be repeated. This significant difference provides rationality for the distribution made in 25 U.S.C. §1291-7 as distinguished from that made in the earlier distribution.

Also there was legal precedent for the distribution made by Congress in the distribution ordered in CD 72 and 298. When an award became payable to the Delaware Tribe for a strip of land in Kansas known as the Delaware "outlet" it was paid to the Oklahoma Delawares (Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma) to the exclusion of the so-called Kansas Delawares, the same as the distribution of Congress in 25 U.S.C. §1291-7. See *United States* v. *Delaware Tribe of Indians*, 427 F. 2d 1218 (Ct. Cm. 1970).

Another legal precedent for the distinction made by the Congress is the ruling in *Minnesota-Chippewa Tribe* v. *United States*, 161 Ct. Cm. 258, 315 F. 2d 906 (1963) which held that public lands and public funds of Indian tribes are tribal properties and are not held in individual ownership. The majority opinion acknowledges that the so-called Kansas Delawares do not have a vested interest in the fund. This is further rational for Congress to distribute the moneys derived from the sale of tribal lands to be paid

in part (10%) to the existing and recognized Tribes and the balance to those members on the rolls of existing and recognized Tribes to the exclusion of those not members of the Tribes nor on their rolls and who over a 100 years ago had taken individual allotments of tribal land in Kansas in fee simple, had taken their individual proportionate part of the existing tribal funds, left the Tribe, renounced Tribal membership and took United States citizenship.

How much rationale must Congress have in exercising its plenary legislative authority regarding Indian affairs? Assuming that some rationale must be present, which is doubted as to the exercise of the unique plenary power of Congress in Indian matters, there is in any event an abundance shown by the record. Congress had before it another Bill which would have distributed CD 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in CD 337. Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls. Congress distributed appropriated funds by 25 U.S.C. §1291-7 with full knowledge that it was a different distribution from that made by 25 U.S.C. §1181-6. This was not a Congressional mistake. It was deliberate Congressional action and in the face thereof the majority would strike down 25 U.S.C. §1291-7 and advise Congress that it erred and must legislate again and in doing so must include the so-called Kansas Delawares but need not include the Munsee Delawares or the Christian Delawares or any other Delawares not belonging to the recognized Oklahoma Tribes. What will be the result if Congress declines to permit the Court to legislate for it regarding its plenary power in Indian affairs? It could be that Congress will decline to change its position for it acted rightly and within its authority or perhaps Congress will balk and refuse to distribute anything to anyone which

is also within its power under the Indian Claims Commission Act. It is my belief and position that if in fact Congress has made a plain and grievous error regarding the so-called Kansas Delawares in the passage of 25 U.S.C. §1291-7 (which I do not believe to be the case) upon petition and showing to the Congress by those aggrieved the Congress may correct the error and by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
NOV 1 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE	)	No. CIV-73-586-E

MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE,	)	
Defendants,	)	
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-74-368-D
ROGERS B. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America,	)	
Defendant,	)	
THE DELAWARE TRIBE OF INDIANS,	)	
Intervenor.	)	

ORDER

Upon consideration of pending motions in these consolidated actions, and the arguments and briefs submitted thereon, it is ORDERED that:

The pending motion to dismiss filed by the defendant United States in No. Civ. 73—586-E, Western District of Oklahoma, entitled Weeks v. United States, et al, is sustained, the action as against the Government being an uncontested suit not within the jurisdiction of the court. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141-42;

United States v. Sherwood, 312 U.S. 584; see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687. The pending motions to dismiss in both of the above entitled actions filed by defendant Morton and all defendants other than the United States are denied.

The pending motion of plaintiff for summary judgment and the motion for partial summary judgment by defendant Delaware Tribal Business Committee and defendants other than the United States and defendant Morton, both pending in No. 73-586-E, Western District of Oklahoma, entitled Wanda June Weeks v. United States, et al, are overruled, it being the view of the Court that there may be genuine issues as to some material facts and that summary judgment procedures in said action are inappropriate.

The plaintiff Weeks in No. 73-586-E, Western District of Oklahoma has moved that said action proceed as a class action on behalf of the Kansas Delawares. In No. 73-C-311, Northern District of Oklahoma, now transferred to this district and consolidated with No. 73-586-E, the complaint requests that the action proceed also on behalf of the Kansas Delawares. In addition the motion of plaintiff Weeks in No. 73-586-E, requests that said action proceed against specified defendants as representatives of the Cherokee Delawares and the Absentee Delawares, respectively.

Pursuant to Rule 23(a), F.R Civ.P., the court finds that the plaintiff class consisting of the Kansas Delawares, and the defendant classes consisting of the Cherokee Delawares and the Absentee Delawares are so numerous that joinder of all members thereof is impracticable; that there are questions of law or fact common to each class relating to the rights of said class in regard to the claim of unconstitutionality under 25 U.S.C.A. § 1291 and related statutes; that the claims of the representative parties plaintiff and defendant are typical of the claims of their respective classes whose alleged rights are involved herein; and that

the representative parties plaintiff and defendant will fairly and adequately protect the interests of the respective classes.

The court further finds that this action may proceed as a class action on behalf of the plaintiff class and against the defendant classes both pursuant to Rule 23(b)(1)(B) and Rule 23(b)(2), since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and since the defendant Morton and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole. See Cranston v. Freeman, 290 F.Supp. 785 (N.D.N.Y.), rev'd on other grounds *sub nom.* Cranston v. Hardin, 428 F.2d 822 (2d Cir.), cert. denied, 401 U.S. 949; Rodriguez v. Swank, 318 F.Supp. 289, 293-295 (N.D. Ill.), aff'd., 403 U.S. 901.

Pursuant to Rule 23(d), F.R.Civ.P., the court ORDERS that there be individual notice by certified mail to all members of the Kansas Delaware class who can be identified through reasonable effort, said notice to be mailed within 30 days hereafter, advising each member that these suits are being maintained as class actions for all Kansas Delawares and describing the nature of the suits; that the judgment, whether favorable or not to him or her, will be binding on all members of said Kansas Delaware class; and that any member may, if he or she desires, enter his or her separate appearance, on his or her own behalf or through counsel, within 45 days after the date of this order.

The court having granted the motions for class actions on behalf of the plaintiff Kansas Delawares in both of the above entitled cases, it is directed that the plaintiffs, by counsel, in both actions confer promptly with a view to

agreement upon arrangements and procedures for notice and all other matters necessary for maintenance of these suits as class actions for the plaintiff Kansas Delawares. If there be any dispute concerning the same, the parties are directed to apply to the Honorable Fred Daugherty, Chief Judge of this district, for any necessary orders prescribing responsibilities as between the parties and counsel in connection with class action procedures. Such application to the Chief Judge should be made within 15 days from the date hereof.

As to the defendant classes of the Cherokee Delawares and the Absentee Delawares, in its discretion under 23(d), F.R.Civ.P., the court determines that personal notice to all members of said defendant classes is not necessary. Unlike the Kansas Delawares who have not had designated representatives and regular communications from them, it appears that the Cherokee Delawares and the Absentee Delawares have been represented by the parties named as defendants in No. 73-586-E, entitled Weeks v. United States, et al. It is, therefore, ORDERED that notice to the defendant classes, the Cherokee Delawares and the Absentee Delawares, be given within 30 days hereof by publication in a tribal business letter or paper, or in a newspaper of general circulation in the city or town designated by the defendant representatives of said classes as having the most circulation to the members thereof. Said notice shall contain the same notifications and provisions for optional separate appearances, by such persons themselves or through counsel, as are provided hereinabove in the notice to members of the Kansas Delaware class.

It is directed that the plaintiffs, by counsel, and the defendant representatives of the Cherokee Delawares and the Absentee Delawares, by counsel, also confer promptly with a view to agreement on an arrangement of procedures for such notice. If there be any dispute concerning the same, the parties are directed to apply to the Honorable

Fred Daugherty, Chief Judge of this district, for any necessary orders. Such application should be made within 15 days from the date hereof.

The court, having disposed of pending motions and applications preliminary to a final hearing on the merits, advises the parties that at an early date after completion of said notices and expiration of the time for additional appearances, the court will hold a hearing on the merits of these actions on all disputed issues of fact, including the constitutional issue as to whether there is a rational basis under constitutional standards for the provisions of 25 U.S.C.A. § 1291 and the statutes related thereto, excluding the Kansas Delawares from participation in the distribution of the judgment funds in dispute in these cases, on which issue, among others, the court will receive all competent proof for final determination on the merits, and final arguments on the merits.

DATED THIS 1st DAY OF NOVEMBER, 1974.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District of Oklahoma

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 1, 1974

By: Adelaide Holston, Deputy

[APPENDIX]

FILED
NOV 4 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
By (s) *Judith E. Morgan*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, Defendants,	)	No. CIV-73-586-E
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. ROGERS D. MORTON, individually and in his capacity as Secretary of the	)	No. CIV-74-368-D

Interior of the United States of America,	)
Defendant,	)
THE DELAWARE TRIBE OF INDIANS,	)
Intervenor.	)

AMENDMENT TO ORDER

On its own motion the court hereby amends its order entered November 1, 1974, in these consolidated actions to provide further as follows:

It is further ORDERED that the cost of notice by certified mail to the plaintiff class of the Kansas Delawares and the cost of notice by publication to the defendant Cherokee Delaware class and the defendant Absentee Delaware class shall be borne by the plaintiff. Cf. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804. Prior to such notice by certified mail and publication, the proposed form of such notice and the proposed manner of publication shall be submitted to the Honorable Fred Daugherty, Chief Judge of the Western District of Oklahoma, for approval after service of a copy thereof on opposing counsel, together with notice stating when the same shall be presented to Chief Judge Daugherty.

DATED this 4th day of November, 1974.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District
Of Oklahoma

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 4, 1974

By: Adelaide Holston, Deputy

FILED
NOV 18 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Joyce Faye Shipp*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, Defendants,	)	No. CIV-73-586-E
and	)	(CONSOLIDATED)

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs,	)	
v.	)	No. CIV-74-368-D
ROGERS D. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America, Defendant,	)	
THE DELAWARE TRIBE OF INDIANS, Intervenor.	)	

ORDER APPROVING FORMS OF CLASS ACTION NOTICE AND PROCEDURES FOR GIVING NOTICE

This matter comes on to be heard this 18th day of November, 1974, for the purpose of entry of an Order approving forms of class action notice, approving the definitions of the respective classes, and approving procedures for giving said notice, the parties being present by counsel. The Court, having examined the suggested forms of notice to the respective classes herein, having heard the arguments of counsel and being fully advised,

IT IS ORDERED THAT the class action notice to the members of the Kansas Delaware class shall be given in the form attached hereto as Exhibit "A."

IT IS FURTHER ORDERED THAT the class action notice to the members of the Cherokee Delaware class shall be in the form attached hereto as Exhibit "B."

IT IS FURTHER ORDERED THAT the class action notice to the members of the Absentee Delaware class shall be in the form attached hereto as Exhibit "C."

IT IS FURTHER ORDERED THAT the notice by certified mail to the members of the Kansas Delaware class shall be mailed on or before Friday, November 22, 1974, and that a single notice may be sent to all adults and minors living at any one address.

IT IS FURTHER ORDERED THAT notice by publication to the Cherokee Delaware class shall be given in the Tulsa World.

IT IS FURTHER ORDERED THAT notice by publication to the Absentee Delaware class shall be given in the Anadarko Daily News.

IT IS FURTHER ORDERED THAT the notices by publication shall be published in the Sunday, November 24, 1974 issues of the respective newspapers.

IT IS FURTHER ORDERED THAT Plaintiff shall bear the cost of publication of the notices as described above.

Dated this 18th day of November, 1974.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELA-	)	No. CIV-73-586-E

WARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE,

Defendants,

and

(CONSOLIDATED)

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated,

Plaintiffs,

v.

No. CIV-74-368-D

ROGERS D. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America,

Defendant,

THE DELAWARE TRIBE OF INDIANS,

Intervenor.

NOTICE OF CLASS ACTION LAWSUIT—
CERTIFIED MAIL

TO: MEMBERS OF THE *KANSAS DELAWARE* CLASS OF INDIANS, AS DEFINED BELOW.

[APPENDIX]

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commisssion Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906. This notice is being sent to you because you may be a member of the Kansas Delaware class.

In this lawsuit, the representative Plaintiff, Wanda June Weeks, who is represented by Delmer L. Stagner and Stephen P. Friot, of the firm of Halley, Spradling, Stagner and Alpern, Attorneys at Law, Oklahoma City, Oklahoma, and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, represented by John Ghostbear, Attorney at Law, of Tulsa, Oklahoma, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated

to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgment funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty, both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce

Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, its members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Kansas Delaware class. You will be bound by the judgment of this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, Defendants,	)	No. CIV-73-586-E
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. ROGERS D. MORTON, individually and in his capacity as Secretary of the	)	No. CIV-74-368-D

[APPENDIX]

Interior of the United States of America,)
Defendant,)
)
THE DELAWARE TRIBE OF INDIANS,)
Intervenor.

NOTICE BY PUBLICATION OF CLASS ACTION LAWSUIT

TO: MEMBERS OF THE DELAWARE TRIBE OF INDIANS, DESIGNATED HEREIN AS THE CHEROKEE DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your. rights. In No CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

In this lawsuit, the representative Plaintiff, Wanda June Weeks and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906. This notice is being sent to you because you may be a member of the Cherokee Delaware class.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgment funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty,

both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Cherokee Delaware class is represented in this lawsuit by Bruce Miller Townsend, Attorney at Law, Tulsa, Oklahoma, and Clyde J. Watts, Attorney at Law, Oklahoma City, Oklahoma. The Absentee Delaware class is represented in this lawsuit by Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma, and by Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Washington, D. C.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, its members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Cherokee Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT.

The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and	)	No. CIV-73-586-E

[APPENDIX]

GRACE SPOONER ROSE, Defendants,	)
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs,	)
v.	) No. CIV-74-368-D
ROGERS B. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America, Defendant,	)
THE DELAWARE TRIBE OF INDIANS, Intervenor.	)

NOTICE BY PUBLICATION OF CLASS ACTION LAWSUIT

TO: MEMBERS OF THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA NOW KNOWN AS THE DELAWARE TRIBE OF WESTERN OKLAHOMA, DESIGNATED AS THE ABSENTEE DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier

and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1886, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

In this lawsuit, the representative Plaintiff, Wanda June Weeks and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior. This notice is being sent to you because you may be a member of the Absentee Delaware class.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgment funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty, both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Cherokee Delaware class is represented in this lawsuit by Bruce Miller Townsend, Attorney at Law, Tulsa, Oklahoma, and Clyde J. Watts, Attorney at Law, Oklahoma City, Oklahoma .The Absentee Delaware class is represented in this lawsuit by Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma, and by Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Washington, D. C.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow,

Henry A. Secondine and Y. A. Scott have been designated by the Court as representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, its members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Absentee Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

[APPENDIX]

FILED
JAN 16 1976
10:15 AM
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Joan H. Johanning*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, vs. THOMAS J. KLEPPE, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA AND TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY; and GRACE SPOONER ROSE, Defendants.	NO. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs,	

VS.	)	
	)	
THOMAS J. KLEPPE, individually and in his capacity as Secretary of the Interior of the United States of America,	)	NO. CIV-74-368-D
Defendant,	)	
	)	
THE DELAWARE TRIBE OF INDIANS, THE ABSENTEE DELAWARE CLASS on behalf of the DELAWARE TRIBE OF WESTERN OKLAHOMA,	)	
Intervenors.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Absentee Delaware Class, and the individual representative members of said class, as defined in the Court's Order of November 1, 1974, certifying this action as a class action, pursuant to F.R. Civ.P. 23(b)(1)(B) and F.R.Civ.P. 23(b)(2), and the Court's Order of May 22, 1975, granting intervention in No. CIV-74-368-D, the Absentee Delaware Tribe of Oklahoma Business Committee, a named defendant and named intervenor in the action, and the individual members of the Absentee Delaware Tribe of Oklahoma Business Committee, named as defendants and intervenors in this action hereby appeal to the Supreme Court of the United States from the final judgment holding partially invalid, and enjoining in its entirety, the operation of Pub.L. 92-456, 86 Stat. 762, 25 U.S.C. Secs. 1291-1297, entered in this action on December 18, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

TOMERLIN, HIGH, PATTON & ROTHBAUM

s/ By: B. J. Rothbaum, Jr.
B. J. Rothbaum, Jr.

[APPENDIX]

CERTIFICATE OF SERVICE

I, B. J. Rothbaum, Jr., a member of the Bar of the United States District Court for the Western District of Oklahoma, and a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on this 16th day of January, 1976, serve one true and correct copy of the above and foregoing Notice of Appeal upon: Mr. Delmer L. Stagner and Mr. Stephen P. Friot, Suite 700—101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for plaintiff, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record of plaintiffs, Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for defendant Secretary of the Interior of the United States; Mssrs. Watts, Looney, Nichols, Johnson and Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for defendant Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, 7th and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for defendant Cherokee Delaware Class, and named individual members thereof, by placing the same in the United States mail, first class postage fully prepaid; I further certify that I did, on the 16th day of January, 1976, serve a true and correct copy of the above and foregoing Notice of Appeal upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D. C. 20006, counsel of record for plaintiff Wanda June Weeks; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D. C. 20420, counsel of record for the defendant Secretary of the Interior of the United States, by placing a copy of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this 16th day of January, 1976, in conformity with 80 Stat. 613, 28 U.S.C.

Section 518, serve a true and correct copy of the above and foregoing Notice of Appeal upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

s/ B. J. Rothbaum, Jr.
B. J. Rothbaum, Jr.

APPENDIX B

82 Stat. 861, 862, 25 U.S.C. Sections 1181-1186:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States. Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on forms prescribed for that purpose. All applications filed shall be reviewed and a judgment of the eligibility of each applicant will be made and recommendation given in writing

to the respective area directors by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of names to the Secretary of the Interior for acceptance on the distribution roll. The determination of the Secretary regarding the utilization of available rolls or records and the eligibility for enrollment of an applicant shall be final.

There shall be withdrawn from the funds on deposit in the Treasury of the United States to the credit of the Delaware Nation that were appropriated by the Act of October 7, 1964 (78 Stat. 1033), and the interest accrued thereon, using the interest fund first, $7,000, which shall be divided equally between the Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma, and shall be available for claims expenses incurred by the duly authorized personnel of the two tribal groups, as set forth in their joint resolution numbered 4-68 adopted on September 9, 1967.

After the deduction of attorney fees and expenses, litigation expenses, all costs incident to the provisions of sections 1181-1186 of this title, and to making the payments authorized by sections 1181-1186 of this title, including the cost of roll preparation, which shall be paid by appropriate withdrawals from the judgment fund, the unexpended balance of the funds on deposit in the Treasury shall be distributed in equal shares to those persons whose names appear on the roll prepared in accordance with section 1181 of this title. No person shall be entitled to more than one per capita share of the funds.

The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The Secretary shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years

of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests.

The funds distributed under the provisions of sections 1181-1186 of this title shall not be subject to Federal or State income tax.

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1181-1186 of this title, including a deadline for filing enrollment applications.

APPENDIX C

TREATY OF 1854 (10 STAT. 1048) (RATIFIED JULY 11, 1854)

Treaty of 1854 (10 Stat. 1048, ratified July 11, 1854) between the Delaware Tribe of Indians and the United States provides, inter alia, as follows:

ARTICLE 1

The Delaware tribe of Indians hereby cede, relinquish, and quit-claim to the United States all their right, title, and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas Rivers, which is described in the article supplementary to the treaty of October third, one thousand eight hundred and eighteen, concluded, in part, on the twenty-fourth September, one thousand eight hundred and twenty-nine, at Council Camp, on James' Fork of White River, in the State of Missouri; and finally concluded at Council Camp, in the fork of the Kansas and Missouri Rivers, on the nineteenth October, one thousand eight hundred and twenty-nine; and also their right, title, and interest in and to the "outlet" mentioned and described in said supplementary article,

excepting that portion of said country sold to the Wyandot tribe of Indians, by instrument sanctioned by act of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kanzas, forty miles, in a direct line, west of the boundary between the Delawares and Wyandots, thence north ten miles, thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river.

ARTICLE 2

The United States hereby agree to have the ceded country (excepting the said "outlet") surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed—such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States lands; and any, or all, of such lands as remain unsold, after being three years subject to private entry, at the minimum Government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

ARTICLE 3

The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quit-claim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same.

ARTICLE 7

It is expected that the amount of moneys arising from the sales herein provided for will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary.

ARTICLE 8

As the annual receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject be referred to the judgment of the President, who may, from time to time, prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment, also how much shall be invested, and in distributing the funds to the people, due regard and encouragement shall be given to that

portion of the Delawares who are competent to manage their own affairs, and who know and appreciate the value of money; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem just and proper.

ARTICLE 11

At any time hereafter, when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: Provided, Such assignment shall be uniform.

ARTICLE 15

A primary object of this instrument being to advance the interest and welfare of the Delaware people, it is agreed, that if it prove insufficient to effect these ends, from causes which cannot now be foreseen, Congress may hereafter make such further provision, by law, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace, and happiness of the Delaware people.

ARTICLE 16

It is agreed by the parties hereto, that the provisions of the act of Congress, approved third of March, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded.

ARTICLE 18

This instrument shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and the Senate, of the United States.

APPENDIX D

TREATY OF 1860 (12 STAT. 1129) (RATIFIED JULY 27, 1860)

Treaty of 1860 (12 Stat. 1129, ratified July 27, 1860) between the Delaware tribe of Indians and the United States provides, inter alia, as follows:

ARTICLE 1

By the first article of the treaty made and concluded at the city of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, between George W. Manypenny, commissioner on the part of the United States, and certain delegates of the Delaware tribe of Indians, which treaty was ratified by the Senate of the United States on the eleventh day of July, one thousand eight hundred and fifty-four, there was reserved, as a permanent home for the said tribe, that part of their country lying east and south of a line beginning at a point on the line between the Delawares and Half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in a easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri river, where the usual high-water line of said creek intersects the high-water line of said river. And by the eleventh article of said treaty it was stipulated that "at any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home, to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: *Provided*, such assignments shall be uniform."

The Delawares having represented to the government that it is their wish that a portion of the lands reserved for

their home may be divided among them in the manner contemplated by the eleventh article of the treaty aforesaid, it is hereby agreed by the parties hereto, that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey. (Emphasis added)

ARTICLE 2

The division and assignment in severalty among the Delawares of the land shall be made in a compact body, under the direction of the Secretary of the Interior, and his decision of all questions arising thereupon shall be final and conclusive.

Certificates shall be issued by the Commissioner of Indian Affairs, for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that the said tracts are set apart for the exclusive use and benefit of the assignees and their heirs.

And said tracts shall not be alienable in fee, leased, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and under such rules and regulations as may be prescribed by the Secretary of the Interior; and the said tracts shall be exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.

Prior to the issue of the certificates aforesaid, the Secretary of the Interior shall make such rules and regulations as he may deem necessary or expedient, respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased

persons. And should any of the Indians to whom tracts shall be assigned, abandon them, the said Secretary may take such action in relation to the proper disposition thereof, as, in his judgment, may be necessary and proper.

The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained.

ARTICLE 3

The Delaware tribe of Indians, entertaining the belief that the value of their lands will be enhanced by having a railroad passing through their respective reservation, and being of the opinion that the Leavenworth, Pawnee, and Western Railroad Company, incorporated by an act of the legislative assembly of Kansas Territory, will have the advantage of travel and general transportation over every other company proposed to be formed, which will run through their lands, have expressed a desire that the said Leavenworth, Pawnee, and Western Railroad Company shall have the preference of purchasing the remainder of their lands after the tracts in severalty and those for the special objects herein named shall have been selected and set apart, upon the payment into the United States treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land: *Provided*, in no event shall the value be placed below the sum of one dollar and twenty-five cents per acre, exclusive of the cost of the survey of the same. (And that the United States will issue a patent in fee-simple to said company, upon the payment as aforesaid, for all the land remaining in Kansas.) It is, therefore, agreed by the United States that the wishes of the Delawares shall be granted; that they will acccept of the trust

reposed upon them; and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances.

And provided further, That the said railroad company shall, finally, and in good faith, sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof so much thereof as may remain undisposed of shall revert to the Delaware nation, to be disposed of as herein provided for other forfeited lands.

ARTICLE 4

Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong to the nation in common.

ARTICLE 8

Any stipulation in former treaties inconsistent with those embraced in the foregoing articles shall be of no force or effect.

ARTICLE 10

The interest accruing to the Delawares under the former treaties, and that which may accrue under this, shall be paid on the first of April and October in each year.

APPENDIX E

TREATY WITH THE DELAWARES, 1866.

Articles of agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas; and whereas the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same; and whereas the Missouri River Railroad Company, a corporation existing in the State of Kansas by the laws thereof,—and which company has built a railroad connecting with the Pacific Railroad, from near the mouth of the Kaw River to Leavenworth, in aid of which road the Delawares, by treaty in eighteen hundred and sixty-four, agreed to dispose of their lands,—has expressed a desire to purchase the present Delaware Indian reservation in the said State, in a body, at a fair price:

It is hereby agreed between Thomas Murphy, superintendent of Indian affairs, John G. Pratt, agent for the Delawares, and William H. Watson, special commissioner, who are duly appointed to act for the United States; and Captain John Connor, Captain Sarcoxie, and Charles Journeycake, chiefs, and James Ketchum, James Connor, Andrew Miller, and John Sarcoxie, councillors, duly appointed and authorized by said Delaware Indians to act for them and in their behalf, viz:

ARTICLE 1. That the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, and Western Railroad Company, according to the terms of a treaty ratified August twenty-second, eighteen hundred and sixty, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

ARTICLE 2. That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

ARTICLE 3. It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the

Secretary of the Interior, when the Department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein: *Provided*, That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, for each child of Delaware blood, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: *And provided further*, That in case there shall be improvements upon any heretofore allotted lands, so selected for children of the Delawares, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at the same time as if the said lands had been sold to the railroad company or other parties.

ARTICLE 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware

council shall so request; when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

ARTICLE 5. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

ARTICLE 6. It is agreed that the proceeds of the sale of the Delaware lands herein provided for shall be paid to said Indians in the manner following, to wit: Whenever the Department of the Interior shall be notified by the council, through the agent, that any of the Delawares who hold land in severalty are ready to remove, at the same time describing their allotments, there shall be paid to each such person the value of his allotment, and that of his family, to enable him to remove to and improve his new home, provided the money for the said allotment shall have been paid to the Secretary of the Interior; and while said money, or any part thereof, shall remain in the Treasury of the United States, the Delawares shall be entitled to receive interest on the amount so retained, at the rate of five (5) per cent. per annum. And the residue of the proceeds of the sale of the Delaware lands, being those which have not been allotted, or which have once been allotted, but have been abandoned by the allottees, shall be added to the general fund of the Delawares, interest thereon to be paid to the Indians in the same manner as is now provided in regard to that fund.

ARTICLE 7. Within thirty days after the ratification of this treaty it shall be the duty of the Secretary of the Interior to give the said Missouri River Railroad Company notice that he is authorized to contract with them or other responsible party or parties for the sale of said lands on the

terms specified in this treaty, indicating the approximate quantity thereof; and within twenty days after receiving said notice at their usual place of doing business in the State of Kansas it shall be competent for said company to elect to make the purchase, by filing with the said secretary their bond, with approved security, in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they will purchase all of the lands to be sold under the provisions of this treaty, and that they will pay for them in accordance with the terms thereof. And upon the filing of a satisfactory bond as above provided by said company, the contract for such purchase shall be concluded by the said secretary with said Missouri River Railroad Company, at not less than two dollars and fifty cents per acre for the whole of the lands herein provided to be sold: *Provided, however,* That if said railroad company shall not within the twenty days above limited file its bond for the purchase as herein prescribed, the Secretary of the Interior may at the expiration of that time accept any offer for the whole of said lands in one body, at not less than two dollars and fifty cents per acre, from any other responsible parties; but no offer shall be considered from other parties than said Missouri River Railroad Company, unless accompanied by a certificate of deposit in the First National Bank of the city of Washington, D. C., to the credit of the said secretary, for an amount equal to ten per cent. of the aggregate value of the land at the price proposed, to be forfeited for the use of the Delawares if the sale should be awarded to said person or corporation so proposing to purchase the lands, and said party should fail to make payment as hereinafter provided.

ARTICLE 8. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay to the said Secretary, in trust for the Delawares, the stipulated price of said unallotted lands, with the appraised value of improvements thereon, excepting therefrom the mill reservation and the quarter sections upon which the council-

house and blacksmith-shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the purchaser until possession is delivered; and from time to time thereafter, as often as the Secretary of the Interior shall notify the said purchaser that ten thousand acres or more of said lands have been vacated by said Indians within three months thereafter, said purchaser shall pay to the Secretary of the Interior, in trust for the said Indians, the stipulated price for said lands, with the appraised value of the improvements; and so on until all are paid for, according to the true intent and meaning hereof; and as said lands shall be paid for, patents therefor, conveying the same in fee-simple, shall be from time to time issued to said purchaser, or to his or its assigns, by the President of the United States.

ARTICLE 9. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the Commissioner of Indian Affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof, to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the Commissioner of Indian Affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled

to receive a patent, in fee-simple, with power of alienation, for the land heretofore allotted him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent, in fee-simple, for the lands heretofore allotted to them, and, if they do not remove with the nation, their *pro rata* share of all annuities and trust-property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

ARTICLE 10. It is further agreed that the funds of the Delawares shall never be applied by the Government to the payment of the debt or debts of any individual member

or members of the nation; nor shall any person be licensed to trade with the Delawares without the consent of the chiefs and council; and the salaries of the chiefs shall henceforward be four hundred dollars per annum.

ARTICLE 11. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the Government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

ARTICLE 12. It is also agreed that if the said Secretary should not be able to sell the said lands as hereinbefore provided, he may cause the same to be appraised, in separate tracts, at their fair cash value, no tract to be valued at less than two dollars and fifty cents per acre, and the same when appraised may be sold at not less than the appraised value, and for as much more as the same will bring, and the money arising from the sale to be applied and distributed as hereinbefore provided.

ARTICLE 13. It is agreed by the Delawares that railroad companies engaged in building roads whose routes shall lie through their new reservation in the Indian country shall have a right of way through and over said lands, not exceeding two hundred feet in width for any such road, and also the right to enter on all lands and take and use such gravel, stone, and other material except timber as may be necessary for the construction of such roads, compensation to be made for any damages done in obtaining such material, and for any damages arising from the location or running of such roads to improvements which shall have been made before such road shall have been located, such damages to be ascertained under regulations to be prescribed by the Secretary of the Interior.

ARTICLE 14. The United States further agree that, in accordance with the general provisions of the sixth article of the Delaware treaty of May thirty, eighteen hundred and

sixty, which have not yet been fulfilled, there shall be credited to the Delawares, in the purchase of their new reservation in the Indian country, the sum of thirty thousand dollars, which credit by the United States shall be received by the Delawares as a full settlement of all claims against the Government for depredations upon timber to the date of the signing of this treaty; and the Delawares shall receive, without cost, from the United States, land included within their new reservation to the amount of twenty-three sections, in place of the twenty-three sections of half-breed Kaw lands referred to in said sixth section of the treaty of eighteen hundred and sixty; and inasmuch as the Delawares claim that a large amount of stock has been stolen from them by whites since the treaty of eighteen hundred and fifty-four, the United States agree to have a careful examination of such claims made under the direction of the Secretary of the Interior, and when the value of such stolen stock shall have been ascertained, the same shall be reported to Congress with a recommendation for an appropriation to pay for the same; and all moneys appropriated for such purpose shall be paid to the owners of said stock.

ARTICLE 15. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes, until after they shall have selected and received title to lands for new homes elsewhere.

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on the 16th day of March, 1976, serve three true and correct copies of the above and foregoing Jurisdictional Statement upon: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Appellees, Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellant, Secretary of the Interior of the United States; Mssrs. Watts, Looney, Nichols, Johnson and Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for Appellant, Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, 7th and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for Appellant, Cherokee Delaware Class, and named individual members thereof, by placing the same in the United States mail, first class postage fully prepaid; I further certify that I did on the 16th day of March, 1976, serve a true and correct copy of the above and foregoing Jurisdictional Statement upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D.C. 20006, counsel of record for Appellee, Wanda June Weeks; Mr. Joseph Fontana, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Appellants, Cherokee Delaware Class and named individual members thereof; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for Appellant, Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did on the 16th day of March, 1976, in conformity with Rule 33, 2(a) of the Rules

of the Supreme Court, serve three true and correct copies of the above and foregoing Jurisdictional Statement upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served; and that service has been made in conformity with Rule 33 of the Rules of the Supreme Court.

.....

Bernard J. Rothbaum, Jr.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1335

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America, THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL., *Appellants-Cross-Appellees,*

VERSUS

WANDA JUNE WEEKS, ET AL., *Appellees-Cross-Appellants,*

and

THOMAS S. KLEPPE, ET AL., Secretary of the Interior of the United States of America, *Appellants-Cross-Appellees,*

VERSUS

DOROTHY FRAZIER and RUTH RATTLER, ET AL., *Appellees-Cross-Appellants,*

and

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA BUSINESS COMMITTEE, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware Class, *Intervenors-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

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April, 1976

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In the
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1335

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America, THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,
Appellants-Cross-Appellees,

VERSUS

WANDA JUNE WEEKS, ET AL.,
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and

THOMAS S. KLEPPE, ET AL., Secretary of the Interior of the United States of America,
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DOROTHY FRAZIER and RUTH RATTLER, ET AL.,
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and

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA BUSINESS COMMITTEE, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware Class,
Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

The Appellees, Wanda June Weeks, Dorothy Frazier, and Ruth Rattler, individually and as members of the Kansas Delaware class, move the Court to dismiss the appeal

filed herein by the Appellants, the members of the Absentee Delaware class, for the reasons that the questions presented in the Jurisdictional Statement filed herein either are not presented by this case or are manifestly so unsubtantial as not to need further argument.[1]

By the Jurisdictional Statement in this Appeal, this Court is asked by the Appellants to issue an advisory opinion and to decide abstract questions of law in many of the Questions Presented. In essence, Questions Presented Nos. 1 and 6 invite only an academic discussion of the holding of the District Court.

If this Court elects to assume jurisdiction to decide Questions Presented Nos. 1, 2, 3, 5, 6, 7, 8(a), 8(b) and 10, it will be dealing only with abstract questions since the District Court did not decide the matter for which review is sought in the manner which is a predicate for the presentation of the questions. Further, the discussion of such questions in the Jurisdictional Statement misinterprets and misrepresents the holding of the District Court. Question Presented No. 4 asks this Court to review a question not contested in the District Court. Question Presented No. 11 presents an issue not decided contrary to the position of the Appellants.

It may fairly be said that the only Question Presented which is on an issue which was actually decided by the

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[1]This motion attacks the Absentee Delaware Jurisdictional Statement largely on the basis that the "Questions" set forth in that statement are simply not presented in this case, but rather are a product of gross and palpable distortion of the reasoning, and indeed, the express language employed by the District Court in its opinion and judgment. For these reasons, the Jurisdictional Statement in this case and this Motion should be read closely in conjunction with the opinion of the District Court.

District Court or was inherent in its judgment is No. 9. Such question involves both a question of fact and of law, but presents no substantial questions of constitutional standards to be applied or other novel question of sufficient importance to cause this Court to accept jurisdiction.

The questions presented in the Jurisdictional Statement filed by the Absentee Delaware Appellants are responded to separately as follows:

QUESTION NO. 1

"WHETHER, IN THE CIRCUMSTANCES OF THIS CASE, THE HOLDING OF *LONE WOLF* v. *HITCHCOCK*, 187 U.S. 553, 565-568, HAS AS THE DISTRICT COURT IMPLIED, BEEN OVERRULED, *SUB SILENTO*, BY *BAKER* v. *CARR*, 369 U.S. 189 [*sic*], 210-211, 215?"

This question is not presented by this cause for the reason that the District Court did not imply that *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), was overruled, *sub silento*, by *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

The *Lone Wolf* case, *supra*, involved an action by members of the confederated tribes of the Kiowa, Comanche and Apache Indians against the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office. The Plaintiffs in *Lone Wolf* were not emancipated Indians, but were wards of the government. The action sought the abrogation of a treaty between the tribe and the United States on the ground of fraud and further sought to void allotments made pursuant to Congressional Acts to members of the tribe and the settling of white men on tribal land after cession of such

land by the treaty in question. The suit directly involved the administrative power of the United States over the *tribal* property and was brought by Indians who were *wards* of the government.

This Court held in such case that the judiciary cannot question or inquire into the motives which prompted the enactment of the legislation. This Court carefully based its judgment on "the relation of dependency they (the Indians) bore and continue to bear towards the government of the United States." The plenary authority over the *tribal relations of the Indians* was the basis upon which Congress acted and that "power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

The District Court in the case at bar, in distinguishing the *Lone Wolf* case, said:

> "The authority conferred upon the other branches for dealing with the Indian Tribes by treaty is involved indirectly in this case in the sense that the historical background for the Delaware awards in question include several treaties with the Tribe, as discussed earlier. *There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function.* Instead, these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution. There is the additional view that enactments dealing with Indians involve the relationship of a ward to his guardian, and there is an element of such a relationship touched on by § 1294. Baker v. Carr, 369 U.S. 186, 215; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 567. *However, the challenge to the classifications made here does not refer to the guardianship relation, nor to*

the discretionary exercise of the guardianship function by the Congress." Appendix, page 30.[2] (Emphasis added.)

It is obvious from the above that the District Court distinguished the *Lone Wolf* case from the case at bar and did not, as this question represents, hold that this Court, in *Baker* v. *Carr*, *supra*, overruled *Lone Wolf*, *supra*. No issues in this case are comparable to those in the *Lone Wolf* case, *supra*.

QUESTION NO. 2

"WHETHER THE DECISION OF THE DISTRICT COURT IS INCONSISTENT WITH *MORTON* v. *MANCARI*, 417 U.S. 535, 552-553 AND n. 24, REGARDING PERMISSIBLE DISTINCTIONS BETWEEN INDIVIDUALS WHO ARE, OR MAY BE, MEMBERS OF FEDERALLY RECOGNIZED INDIAN TRIBES AND OTHER INDIVIDUALS, WHO COULD BE RACIALLY CLASSIFIED AS 'INDIANS,' BUT WHO DO NOT MEET THE STATUTORY OR TRIBAL CRITERIA FOR MEMBERSHIP IN A FEDERALLY RECOGNIZED TRIBE?"

The suggestion that the decision of the District Court involved distinctions between individuals who are or who are not members of federally recognized Indian tribes is incorrect. The distribution Act found to be unconstitutional had no tribal affiliation requirements, but was a simple plan to distribute funds per capita to lineal descendants (without regard to tribal affiliation or dependency

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[2] Appendix citations are to the Appendix to the Jurisdictional Statement in Case No. 75-1335 in this Court. Three appeals are pending from the Judgment of the District Court (75-1301; 75-1328; and 75-1335). The Secretary of the Interior has filed a Notice of Appeal, but has not filed a Jurisdictional Statement.

status) of persons whose names appear on two defined rolls, leaving out the lineal descendants of persons whose names appeared on a roll filed with the Commissioner of Indian Affairs in 1867, and who were active participating members of the Delaware tribe at the time of the wrong for which the Indian Claims Commission judgment granted recompense.

Even the portion of the award that was to be distributed to persons whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary" (Absentee class members) included persons of less than 1/8th Indian blood and who were, therefore, not eligible to be members of the Absentee Delaware Tribe of Western Oklahoma, but were eligible to be on such roll.

There can be no question of inconsistency between the decision of the District Court and with *Morton* v. *Mancari*, 417 U.S. 535, 92 S.Ct. 2474, 41 L.Ed.2d 290 (1974), since the awards in issue were not distributable to "federally recognized tribes" or to members thereof and no such distinction was in any manner involved.

QUESTION NO. 3

"WHETHER THE DISTRICT COURT ERRED IN LIMITING TO ITS PARTICULAR FACTS THIS COURT'S AFFIRMANCE OF *SIMMONS* v. *EAGLE SEELATSEE*, 384 U.S. 209, *aff'g* 224 F.Supp. 808 (E.D. Wash. 1965), AND REFUSING TO APPLY THE PRINCIPLE OF *SIMMONS* IN THE PRESENT CASE?"

The principle of *Simmons* v. *Eagle See'atsee*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966), *aff'g* 224 F.Supp. 808 (E.D. Wash. 1965), referred to in this question, is not stated, but, in the argument on page 33 of the Jurisdictional Statement, reference is made to the fact that the *Simmons* case, *supra*, held that Congress has plenary power to regulate and define tribal membership.

Nothing in this case is contrary to that principle. As noted above, membership in an Indian tribe is not involved except as the matter relates to the lineal descendants of members of the Delaware Tribe in 1854.

The District Court could not have erred in "refusing to apply the principle of *Simmons* in the present case" where no intra-tribal matters or tribal membership matters were involved.

This question is not presented under the issues of this case and the facts before the Court, and it, therefore, presents no substantial issue to be considered by this Court.

QUESTION NO. 4

"WHETHER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)(B) AND 23(b)(2) WERE IMPROPERLY EMPLOYED BY THE DISTRICT COURT TO AVOID DISMISSING THIS ACTION, AND, IF SO, WHETHER THE ADMITTED IMMUNITY OF THE TRIBAL BUSINESS COMMITTEE FROM SUIT AND ITS STATUS AS AN INDISPENSABLE PARTY WAS DISREGARDED THROUGH A USE OF CLASS ACTION PROCEDURE WHICH CONTRAVENES THIS COURT'S HOLDING IN *UNITED STATES* v. *UNITED STATES FIDELITY AND GUARANTY COMPANY*, 309 U.S. 506, 512-513?"

In the *Weeks* case, no suit was brought against any Indian tribal entity. Persons who were representatives of the defendant classes were individually sued, and the District Court found that they were representative of the lineal descendant classes whose rights would be affected by the judgment. Declaratory relief was the only relief sought as against such persons and the classes they represent. No relief was granted against any tribal entity (Appendix, page 27).

In the *Frazier* case, the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma were permitted to intervene, but no relief was sought nor granted against such tribal entities. The District Court did not, as stated by the Appellants, enter a declaratory judgment against "individual members of the Tribe as 'Representatives' of the Tribe and tribal business committee." The defendant representatives of the two classes of lineal descendants were sued as representatives of such classes, not as representatives of any tribal entities.

This action is a classic one for the utilization of the class action device. The defendant parties in each class,

being present lineal descendants of persons on two defined rolls, number approximately 9,573 (Appendix, page 43, note 36), a class so numerous that joinder of all members was impracticable; the questions of law and fact were common to all members of the class, the defenses of the representative parties were typical of the defenses of the class and the representatives would fairly and adequately protect the interests of the class. Rule 23(a), Fed. Rules of Civil Procedure. The requirements of Rule 23(b)(2) were likewise met. The defendant classes are clearly defined.

It is not stated by the Appellants how it is asserted that the class action device was "improperly employed," nor on what basis it is contended that the business committees were indispensable parties. Such contentions were never made in the District Court and no objections to the case proceeding as a class action were ever made known to the District Court (Appendix, page 10, note 4).

The Appellants cite the case of *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940), and state that the use of the class action device contravenes this Court's holding. That case did not involve the utilization of the class action device and no issues decided in that case touch on the question presented, except as that case reaffirms the time-honored principle that the United States and the Indian Nations in *tutelage* are immune from suit. No contrary contention is made in this action.

That this action involves no tribal properties or issues relating to the administration of Indian affairs in such a manner as to cause this action to be considered nonjus-

ticiable has been demonstrated above. Question No. 4 offers no additional or different issue.

Question No. 4 tenders no substantial issue for determination by this Court.

QUESTION NO. 5

"WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT CONGRESS WAS FORBIDDEN BY THE CONSTITUTION FROM RELYING UPON THE HOLDING OF THE COURT OF CLAIMS THAT 'THE INDIAN CLAIMS COMMISSION ACT REQUIRES THAT AWARDS BE MADE, NOT TO INDIVIDUAL DESCENDANTS OF TRIBAL MEMBERS AT THE TIME OF THE TAKING, BUT TO THE TRIBAL ENTITY OR ENTITIES TODAY?' *MINNESOTA CHIPPEWA TRIBE* v. *UNITED STATES*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971)."

The District Court held that Congress is "forbidden" from enacting a distribution statute that is invidiously discriminatory against a class of Indians by adopting classifications which were arbitrary and reflected no policy which bore a rational relation to the legitimate legislative goal of compensating present representatives of Indians wronged through a breach of a treaty.

The quote set out within this question from the *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 315 F.2d 906 (1971), is taken out of context and does not have the limited meaning ascribed to it when considered in the context of the case. The Court of Claims distinguished the *Minnesota Chippewa* case, *supra*, from the case of *McGhee* v. *United States*, 122 Ct.Cl. 380, *cert. den.* 344 U.S. 856, on the ground that in the *McGhee* case, there were members

of the Creek Nation who were not organized and who would not benefit at all from an award to the organized Oklahoma Creeks (page 271 and note 12). This distinction applies equally to the case at bar, and, thus, the *Minnesota Chippewa* case, *supra*, by its own terms, does not apply to a situation where as here, present representatives of members of the tribe at the time of the wrong are not members of a federally recognized tribe, but they are entitled to share in the award.

The Court of Claims, in cases after the *Minnesota Chippewa* case, *supra*, cautioned against a construction of that holding as contended for by the Appellants herein. These cases are discussed at length in the opinion of the District Court at pages 45 through 48 of the Appendix.

The predicate for Question No. 5, *viz.*, that the District Court held that the Constitution forbade Congress from relying upon the holding of the Court of Claims in the *Minnesota Chippewa* case, *supra*, being absent, the question is not presented for this Court's determination.

QUESTION NO. 6

"WHETHER AN ACT OF CONGRESS, DISTRIBUTING JUDGMENT FUNDS AND INVOLVING A NONCONTRACTUAL, NONVESTED CLAIM ON THE PUBLIC TREASURY, MUST MEET THE RIGOROUS STANDARDS OF JUDICIAL REVIEW APPLICABLE TO STATUTES INVOLVING CRIMINAL PROCEDURE, PARENTAL CUSTODY PROCEEDINGS, MARITAL AND FAMILY RELATIONS, AND OTHER BASIC LIBERTIES OF THE INDIVIDUAL, OR WHETHER THE MORE FLEXIBLE STANDARD OF REVIEW EMPLOYED IN AREAS OF ECONOMIC AND SOCIAL BENEFIT LEGISLATION IS APPLICABLE TO SUCH AN ACT OF CONGRESS?"

The District Court did not hold that the distribution act here involved had to meet the rigorous standards of judicial review referred to in this question. In fact, the District Court specifically declined to apply the rigorous "suspect classification" test:

> "Since no suspect classification or fundamental interest is involved, our inquiry is whether the classification excluding the Kansas Delawares is rationally related to a legitimate government interest, or whether it invalidly excludes a group standing on equal footing with others benefited. Jimenez v. Weinberger, 417 U.S. 628, 636-37; see also Weinberger v. Salfi, ... U.S. ....., ... (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84; McDonald v. Board of Education, 394 U.S. 802, 809." App. at 33.

The District Court noted that the claim is that of the injured ancestral tribe and present-day groups were before the Commission only on behalf of the ancestral entity (Appendix, page 53). The District Court then held:

> "In view of the redress which was the goal of the statute and the award, and in view of the Kansas Delawares' standing being equal in the context of that goal to that of the Absentee and Cherokee Delaware groups benefited, Jimenez v. Weinberger, 417 U.S. 628, 637; United States Department of Agriculture v. Moreno, 413 U.S. 528, 537, we cannot sustain the unequal classification and the arbitrary exclusion it makes. Against the history, the statutes and the treaties involved, the designation of the two 'modern groups' for exclusive distribution of the award is a discrimination reflecting no policy, but simply arbitrary and capricious action. Baker v. Carr, *supra*, 369 U.S. at 226." (Appendix, page 54.)

Whether the standards referred to in Question No. 6 are more or less rigorous than those applied in this case is not an issue for determination. The standard applied is that which has historically been applied in Equal Protection cases. *Jimenez* v. *Weinberger*, 417 U.S. 628, 94 S.C. 2496, 41 L.Ed.2d 363; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 542, 93 S.Ct. 2821, 2829, 37 L.Ed.2d 782 (1973); *Reed* v. *Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971).

The distinction (employed by Congress) between the classes of members of the historical tribe had no fair and substantial relation to the object of the legislation, *viz.*, to redress for the historical wrong, and all persons similarly circumstanced were not treated alike. Such classifications offend the principles of Equal Protection. *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *United States Department of Agriculture* v. *Moreno, supra; Reed* v. *Reed, supra;* and *F. S. Royster Guano Co.* v. *Com-*

monwealth of Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920).

Question No. 6 presents no issue for determination by this Court.

QUESTION NO. 7

"WHETHER THE HOLDING OF THE DISTRICT COURT, WHICH, AS APPLIED, REQUIRES THAT STATUTES DISTRIBUTING JUDGMENT FUNDS BE DRAFTED SO AS TO PERMIT AN INDIVIDUALIZED HEARING OF, AND DETERMINATION UPON, THE CLAIM OF EVERY PERSON WHO ALLEGES ANCESTRY IN AN INDIAN TRIBE FROM THE 'TIME OF THE WRONG' IS INCONSISTENT WITH THIS COURT'S DECISION IN *WEINBERGER* v. *SALFI*, 422 U.S. 749, 776-785?"

The opinion and Judgment of the District Court are devoid of any language which expressly, or in practical effect, would require an individualized hearing of any Kansas Delaware judgment fund claimant. The assertion that the District Court holding has this effect is a transparently misleading attempt to "shoe horn" this case into the factual context of *Weinberger* v. *Salfi*, *supra*, and to create from the whole cloth a question not presented on this appeal.

As written, the Act required a tracing of lineal ancestry to two rolls by the members of the Cherokee Delaware class and the Absentee Delaware class. The result of the decision of the District Court is that the Kansas Delaware class will likewise be required to trace their ancestry directly to a definite roll, *viz.*, the roll of persons prepared pursuant to Article 9 of the Treaty with the Delawares of July 4, 1866, 14 Stat. 793.

Since the Absentees could trace their ancestry to persons on "or eligible to be on" the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, individual hearings would be necessary in *their* case if their ancestors were not on but were eligible to be on such roll. No eligibility criteria are provided by the Act or by the history of the compilation of such roll (Appendix, page 42, note 35). No such complication will be added by inclusion of the Kansas Delawares since (unlike the criteria for the Absentee Delaware class) the names of the ancestors through whom the Kansas Delawares may claim is *known* and *definite* (Appendix, page 43).

In their arguments in support of this question and the preceding question, the Appellants assert that "ethnological evidence" will be necessary for the Kansas Delawares to prove their entitlement for inclusion (Appendix, pages 25, 26, 29).

There are no *ethnological* considerations involved. This is a case of pure and simple lineal descendancy to named persons on definite recorded rolls.

The case of *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), relied upon by the Appellants as authority for their Question No. 7, involved the question of whether a duration of relationship provision in the Social Security Act, inserted to prevent fraud, was valid. The individualized hearings which would result from this absence of a duration of relationship provision afforded the legitimate rationale for the inclusion of a test which had the effect of excluding some who could not qualify for benefits but who were not guilty of fraud. The case is not

in point. Further, as the District Court noted, the avoidance of fraud or sham claims was not the reason for the exclusion of the Kansas Delawares (Appendix 43).

There being no requirement as a result of the holding of the District Court that individualized hearings will be required for Kansas Delaware claimants, there can be no inconsistency with this Court's decision in *Weinberger* v. *Salfi, supra*. Question No. 7, therefore, presents no issue for this Court's determination.

QUESTION NO. 8

"(a) WHETHER THE DISTRICT COURT ERRED IN ADOPTING AS A STANDARD FOR CONSTITUTIONAL REVIEW OF INDIAN CLAIMS JUDGMENT STATUTES A THEORY OF 'BUT FOR' CAUSATION, INSEPARABLY LINKING THE JUDGMENT STATUTES TO THE THEORETICAL CIRCUMSTANCES WHICH COULD HAVE, BUT DID NOT, EXIST, AT THE 'TIME OF THE WRONG' WITHOUT REGARD FOR ANY INTERVENING CIRCUMSTANCES OR EVENTS, *e.g.*, BY HOLDING THAT IF A SUM CERTAIN HAD BEEN PAID TO THE DELAWARE TRIBE IN 1854, THE CONSTITUTION REQUIRES A CONCLUSIVE PRESUMPTION THAT THIS SAME SUM WOULD HAVE BEEN A PART OF THE TRIBE'S ASSETS DECADES LATER?"

The District Court did not hold that "if a sum certain had been paid to the Delaware Tribe in 1854, the Constitution requires a conclusive presumption that this same sum would have been a part of the tribe's assets decades later."

This is a reference to the fact that the funds represented by the award by the Indian Claims Commission would have, had there been no breach of the Treaty of 1854, been placed in the Delaware National Trust Fund in 1857.

Such fund was to be used for the benefit of the Delaware people and, in 1866, a treaty was entered into under which the ancestors of the Kansas Delawares received a pro-rata part of that fund, as diminished by the treaty breach. The District Court very reasonably noted that had the treaty breach not occurred, the Kansas Delaware ancestors would have received their share of the fund as increased (Appendix, pages 49, 53, 54).

By this question, the Appellants urge that such fund might have been spent between 1857 and 1866. Of course, it might have been had it been available at such time. But, it would have been spent for the welfare of the Delaware people, of which the Kansas Delawares' ancestors were a part, and they would have received the benefit of such use of the funds. The question is frivolous and of no substance.

"(b) PARTICULARLY, WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE TREATY OF JULY 4, 1866, 14 STAT 793, 796, BY WHICH THE ANCESTORS OF THE PRESENT 'KANSAS DELAWARE' CLAIMANTS RENOUNCED THEIR DELAWARE CITIZENSHIP AND RIGHT TO PARTICIPATE IN TRIBAL COUNCILS, AND ASSUMED UNITED STATES CITIZENSHIP AND OTHER BENEFITS UNAVAILABLE, AT THAT TIME, TO TRIBAL INDIANS, SEE *ELK* v. *WILKINS*, 112 U.S. 94, 103-106, WAS IRRELEVANT BECAUSE THE DUE PROCESS CLAUSE COMMANDS CONGRESS TO CONCLUSIVELY PRESUME 'BUT FOR' CAUSATION IN JUDGMENT STATUTES?"

This statement of facts omits to add that the present Kansas Delawares are descendants also of minor Delaware Indians who *did not* renounce their Delaware citizenship and right to share in the tribal assets. It omits to add that

the adult Kansas Delawares who did resign from the tribe did so on the *express condition* that they would receive their pro-rata share of the fund of which the Indian Claims Commission award represents a part. It omits to add that Congress, by an Act in 1875, restored to Indians any rights to tribal assets which they may have lost by a prior abandonment of their tribal relations. 18 Stat. 420, 43 U.S.C. §189.

The District Court found that there were no events after the time of the wrong which changed the rights of the members of the Delaware Tribe as it then existed to share in the award of the Indian Claims Commission to redress for that wrong (Appendix 49).

Elk v. *Wilkins*, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643, referred to in this Question, did not in any manner involve an issue which is in this case. That case involved only the question of whether an Indian abandoning his tribe and taking up residence with white persons became a citizen of the United States without naturalization or Congressional Act specifically conferring citizenship status.

This question tenders no issue for the Court's determination.

QUESTION NO. 9

"WHETHER, REGARDLESS OF THE STANDARD OF REVIEW EMPLOYED, THE TERMS OF 86 STAT. 762, 25 U.S.C. 1291-1297 ARE SO ARBITRARY AND CAPRICIOUS AS TO BE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?"

The purpose of the challenged statute being to compensate the present representatives of the members of the Delaware Tribe as it existed in 1854, the standard of review was whether such statute was reasonably calculated to accomplish such legislative purpose and whether a group on equal footing with the benefited groups was invalidly excluded due to a baseless distinction.

The District Court found that the status of the three classes of claimants to share in such fund was identical and that the exclusion of the Kansas Delaware class was apparently inadvertent (Appendix, pages 38, 39, 54). The testimony of the attorney who represented the claimants in the Indian Claims Commission, appearing before the Subcommittee on Indian Affairs in the House Committee on Interior and Insular Affairs, was that if the statute was approved in the form in which it was later enacted, *there would be no exclusion of descendants of members of the Delaware tribe as it existed in 1854.* The existence of the Kansas Delaware class was not known to the Indian representatives who appeared before the Congressional Subcommittees and the question was never considered by Congress (Appendix, note 29, page 38).

The proffered rationale to support the exclusion of rightful claimants to share in the award is now offered as a

rationale which *might have been* a reason for the exclusion if the matter *had been* considered by Congress. The District Court found such proffered rationale to be wholly lacking in substance and not supportive of the exclusion, resulting in the invidious discrimination.

Question No. 9 asks this Court to consider whether the exclusion of a class of claimants which stood on the same footing as the included class was arbitrary and capricious. The answer to this question, we submit, is so clearly established in the decisions of this Court that it presents no substantial question to be decided in this appeal.

The unequal treatment of classes with equal standing and the arbitrary exclusion of a class rests on no foundation rationally related to the legitimate governmental interest serving the purposes of the Act. (See cases cited by the District Court on page 54 of the Appendix.)

The Equal Protection component of the Due Process clause of the Fifth Amendment does not permit such invidious discrimination and since there was no rationale which reasonably supported the discrimination, there is no novel question presented for review by this Court.

The suggestion that the accepted standards should not apply to an action where rights of persons arise out of Indian history is clearly untenable. To accept such a proposition would be a form of racism and would deny to the citizens of Indian heritage an equal standing before the law. Such an approach to this case would be tantamount to stating that all emancipated, non-ward, wholly independent Indians are second-class citizens.

The reasoning supporting the Appellants seems to be that the Treaty of 1866 with the Delaware tribe granted each Delaware who elected to remain in Kansas in 1867 a pro-rata share of the fund as a condition to their resignation from the tribe; and that upon the acceptance by such Indians of the responsibilities as United States citizens, such persons would not thereafter have standing to claim their share of such fund because the Constitution grants exclusive powers to Congress to deal with Indian tribes. On the one hand, these citizens were granted the rights of all other United States citizens, but when they seek to enforce such rights, the Appellants would say they are precluded from doing so because the legislation which is challenged involves "Indian rights" and, thus, involves political questions beyond review by the Courts. Thus, the crux of the matter is that the Appellants would have this Court create a constitutionally blighted category of "has been" Indians that never were and are not citizens possessed of constitutional rights guaranteed to all.

It is respectfully submitted that the discrimination against the Kansas Delaware class is clearly shown to have been arbitrary and capricious, without a reasonable rationale and under the time-honored standards of equal protection, they have been denied rights secured to them, as they are secured to all citizens.

This question, we submit, does not tender a substantial question for review by this Court.

QUESTION NO. 10

"WHETHER THE DISTRICT COURT ERRED IN DISREGARDING THE CONGRESSIONAL POLICY OF DISTRIBUTING INDIAN CLAIMS JUDGMENT AWARDS ON A BASIS OTHER THAN ETHNOLOGICAL 'TRACING' OF 'BLOOD DESCENDANTS' FROM THE 'TIME OF THE WRONG' FOR WHICH THE AWARD WAS MADE, IN THE ABSENCE OF AN UNEQUIVOCAL SHOWING THAT THIS CONGRESSIONAL POLICY IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?"

This question presumes the existence of a Congressional policy not shown to exist either by the record in this case or demonstrated by citation of authorities in the Jurisdictional Statement.

In this specific instance, the Congress adopted an Act to distribute an Indian Claims Commission award to lineal descendants of persons on two specific rolls. In so doing, the Congress excluded a class of persons equally entitled to share in such award. By such exclusion, the Congress invidiously discriminated against the excluded class. Whatever general policy the Congress has adopted as to other Indian Claims Commission awards is irrelevant in the determination of whether the Equal Protection rights of the excluded Delaware Indians were violated.

The "tracing" referred to in this question is not "ethnological," but is one of lineal blood descendancy. No Congressional policy as to such matters has been demonstrated and the District Court was not made aware of any general policy which it could have considered as being or not being repugnant to the Due Process Clause of the Fifth Amendment.

In considering the Congressional Act in question, the inquiry was whether there was a classification which bore no rational relationship to the purposes of the distribution statute, to redress for a breach of a treaty.

This involved a consideration of the historical background and the purposes of the Indian Claims Commission Act to enable the Court to determine whether the classification was calculated to achieve the legislative purpose intended. In so doing, Congress inadvertently excluded the Kansas Delaware class which the District Court found stood on the same footing in relation to the award as the other classes. No general policy of Congress as to how present representatives of the parties who were wronged are to be determined in Indian Claims Commission matters is involved. However such determination is made, the Equal Protection component of the Fifth Amendment demands that all persons in equal standing be equally treated unless there is a rationale reasonably related to the Congressional purpose which justifies a classification which may result in unequal treatment. No such rationale was shown in this case.

Question No. 10 does not tender a substantial question for determination by this Court and does not present a question which can be reached in this case.

QUESTION NO. 11

"WHETHER THE DISTRICT COURT PROPERLY ENJOINED THE OPERATION OF AN ACT OF CONGRESS UPON THE COMPLAINT OF PARTIES ALLEGING A MONETARY TAKING, RATHER THAN DISMISSING THE COMPLAINT WITHOUT PREJUDICE TO AN ACTION IN THE COURT OF CLAIMS?"

The Absentee Delaware Appellants discuss the substantiality of this question at pages 34-35 of their Jurisdictional Statement. In that discussion, Appellants correctly point out that the "just compensation" issue was decided by the District Court in *Appellants' favor* and made consideration of Appellants' Tucker Act defense unnecessary. See Jurisdictional Statement, *supra*, and the District Court Opinion at Appendix 65. Thus, this two-pronged issue formed no part of the holding of the court below, formed no part of the basis for the judgment and, in any event, was decided favorably to the Appellants. This question can hardly be said, in this context, to be presented by this appeal.

CONCLUSION

The Appellants make several references to and rely upon the dissenting opinion of Judge Daugherty in the District Court (Appendix, pages 16, 28, 30, 31, 34). It is appropriate to observe that Judge Daugherty viewed this case as involving a matter of ". . . distribution of funds to the Indian Tribe and members on their rolls" (Appendix, page 82). As so viewed, the case might have involved the serious jurisdictional infirmities noted by Judge Daugherty. The cases cited and relied upon by Judge Daugherty were cases

in which the rights of *unemancipated Indians* were involved or the administration of *tribal properties* was an issue. The Appellants, on page 23 of their Jurisdictional Statement, and Judge Daugherty, in his dissenting opinion (Appendix, page 82), cite the case of *National Indian Youth Coun., Int. Ind. Sch. Chap* v. *Bruce*, 485 F.2d 97 (C.A. 10th, 1973). That was a suit against officials and employees of the BIA and an employee of the Public Health Service seeking the closing of a Navajo school on an Indian reservation and an attack on the practices and policies at such school. The action was dismissed on the ground that sovereign immunity precluded the action. The Court of Appeals affirmed on the ground that it was an unconsented suit and noted also that the Courts are without jurisdiction when confronted with nonjusticiable political questions, such as determining the *status of Indian tribes*; that Congress has exclusive plenary legislative authority over Indians and all of *their tribal relations;* and that the Court has recognized the plenary power of Congress to control and manage the affairs *of its Indian wards*. The Court further buttressed its affirmance of the dismissal by stating that credence should be particularly accorded those who are working with treaties; and that courts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion. None of these factors are involved in the case at bar.

The Kansas Delaware lineal descendants of the historical Delaware tribe are fully emancipated, have no reservation or tribal trust properties which are the subject of the legislation and their affairs are not administered by the government.

It is submitted that the reliance upon the *Lone Wolf* and *National Indian Youth Council* cases, *supra*, and others which have similarly held that the administrative control of Indian tribal properties, or the governing of unemancipated Indians involve nonjusticiable questions, is misplaced when applied to distribution of funds between non-ward Indians whose ancestors were members of a formerly existing but abandoned tribe and the funds were appropriated to pay judgments entered after judicial proceedings.

The Appellants, on page 30 of their Jurisdictional Statement, noted that Judge Daugherty had stated that there is an "abundance" of rationale supporting the challenged legislation. They then quote from the dissenting opinion (Appendix, page 89), italicizing for emphasis the statement of Judge Daugherty "that there were some people claiming Delaware ancestry" who would not be covered by the Act. This leaves the clear impression that Congress *intended* to exclude the Kansas Delawares. The clear fact is that the "some people" referred to were not the Kansas Delawares but were Munsee Indians whose ancestors were not with the tribe at the time of the wrongs (Appendix B, pages 36, 37, 39).

Judge Daugherty stated that there had been problems, turmoil, confusion and delay in the distribution of a prior award in which the Kansas Delawares shared and that the avoidance of such problems in the later statutes afforded a rationale to support the change (Appendix, page 86). The fact is that none of the problems, turmoil, confusion or delay in the past was in any way connected with or related to the Kansas Delawares, but resulted from claims by Munsee Indians (Appendix, page 40). Judge Daugherty

noted that the Kansas Delawares stayed in Kansas when the main body of the tribe joined the Cherokee Nation and noted further the other historical facts relating to that move without also noting that the Kansas Delawares did so on the *express condition* contained in the Treaty of 1866 that they would receive their pro-rata part of the very fund which the Indian Claims Commission found to have been diminished by the treaty breach and for which the award was entered. The case of *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202 (Ct.Cl. 1960), is cited as authority for the separation from the tribe as a supporting rationale without noting that in the *Miami* case, the separation occurred *prior* to the time of the wrong. The Kansas Delaware separation was *after* the wrong.

Judge Daugherty cites, as supporting rationale for the challenged statute, the historical differences in the status of the Delaware tribe at an earlier date from its status after the tribe was dissolved in 1867, stating that these differences provided rationale for the change from an earlier award in which the Kansas Delaware class shared to the later one where they were excluded. The changes in status occurred *after* the wrong in 1857. At the time of the two wrongs for which the awards were made, the status of the tribe and its members was exactly the same except that they were living in different states. Further, the legislative history shows that any such change, if there was any, was not the reason for the exclusion of the Kansas Delawares.

Judge Daugherty cites as a legal precedent for the challenged statute, the case of *United States* v. *Delaware Tribe of Indians*, 427 F.2d 1218 (Ct.Cl. 1970), which he says

provided for payment of an award entered for a transaction involving the Delaware "outlet" and states that "it was paid to the Oklahoma Delawares (Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma) to the exclusion of the so-called Kansas Delawares" (Appendix, page 88).

An appropriation to pay the award given in the above case has been made but no payment of such funds has been made to anyone. No plan of distribution for such payment has been submitted to Congress and, in fact, the Secretary of the Interior is withholding action on such plan awaiting the final determination of this case. Such case is no legal precedent to support the challenged legislation.

The "abundance" of rationale suggested by Judge Daugherty as supportive of the challenged discrimination melts upon careful scrutiny. The "powerful dissent," as the Appellants characterize the dissenting opinion (Appendix, page 31), insofar as it is based upon a finding of no jurisdiction in the matter, is lessened greatly in its import when it is considered in the light of the fact that Judge Daugherty treated the matter as if the Indians involved were unemancipated wards of the government, who are members of presently existing Indian tribes. This lack of comprehension of the true status of the parties and the nature of the funds to be distributed so colored the consideration of the other facets of the case that "rationale" was found which is either wholly illogical or contrary to the facts. Even the legal precedent relied upon is non-existent.

We submit that the dissent of Judge Daugherty should not lend weight to the argument that the questions pre-

sented are substantial when, on close analysis, it is evident that no substantial questions are suggested by the Appellants' Jurisdictional Statement.

We submit that the appeal of the Absentee Delawares should be dismissed for lack of presentation of substantial questions.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of Interior of the United States; Messrs. Watts, Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver, Tulsa, Oklahoma 74119, counsel of record for Cherokee Delaware class and named individual members thereof; Messrs. Joseph S. Fontana and John R. Keys, Winston & Strawn, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Cherokee Delaware class and named individual members thereof; Mr. George C. Christensen, Winston & Strawn, Suite 5000, One First National Plaza, Chicago, Illinois 60603, counsel of record for Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail, first class postage thereon fully prepaid; I further certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; and Mr. Duard

Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of ....., 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

.....

Delmer L. Stagner

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA
BUSINESS COMMITTEE, ET AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA
BUSINESS COMMITTEE, ET AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

INTRODUCTION

This Brief is submitted in response to the Order of the Court dated June 14, 1976.

OPINION BELOW

The opinion of the District Court is reported as *Weeks v. United States*, 406 F.Supp. 1309 (W.D. Okla., 1975). A copy of the opinion, dissenting opinion, judgment and pertinent orders of the court are attached to the Jurisdictional Statement as Appendix A and may be found at pages 1a-135a of the Jurisdictional Statement of these appellants.

JURISDICTION

Appellees, the "Kansas Delawares", invoked the jurisdiction of the District Court pursuant to 28 U.S.C. 1331(a). Appellees' complaint alleged that 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 was discriminatory and violative of the Due Process Clause of the Fifth Amendment and sought an injunction restraining the operation of the statute as well as other relief. Pursuant to 28 U.S.C. 2282 a three-judge District Court was convened.

On December 18, 1975 the District Court, Judge Daugherty dissenting, entered its judgment enjoining the operation of the statute, holding it arbitrary and violative of the Fifth Amendment. A timely Notice of Appeal was filed on January 16, 1976, J.S. App. pp. 115-117. The appeal was timely docketed on March 15, 1976. Probable jurisdiction was noted on June 14, 1976. The time for filing the Brief on the Merits was, on July 7, 1976, extended to and including August 18, 1976.

The jurisdiction of this Court to review the judgment below on direct appeal is conferred by 28 U.S.C. 1292. E.g., *Morton* v. *Mancari*, 417 U.S. 535.

QUESTIONS PRESENTED

The District Court held 86 Stat. 762, 25 U.S.C. 1291-1297, a statutory scheme distributing some nine million dollars to satisfy an award of the Indian Claims Commission, unconstitutional for failure to conform to the "equal protection component" of the Due Process clause of the Fifth Amendment. The questions presented by this holding of first impression are:

1. Whether, in the circumstances of this case, the holding of *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565-568, has, as the District Court implied, been overruled, *sub silento,* by *Baker* v. *Carr,* 369 U.S. 186, 210-211, 215?

2. Whether the decision of the District Court is inconsistent with *Morton* v. *Mancari,* 417 U.S. 535, 552-553 and n. 24, regarding permissible distinctions between individuals who are, or may be, members of federally recognized Indian Tribes and other individuals, who could be racially classified as "Indians," but who do not meet the statutory or tribal criteria for membership in a federally recognized tribe?

3. Whether the District Court erred in limiting to its particular facts this Court's affirmance of *Simmons* v. *Eagle Seelatsee,* 384 U.S. 209, *affirming* 224 F.Supp. 808 (E.D. Wash. 1965), and refusing to apply the principle of *Simmons* in the preesnt case?

4. Whether Federal Rules of Civil Procedure 23(b)(1)(B) and 23(b)(2) were improperly employed by the District Court to avoid dismissing this action, and, if so, whether the admitted immunity of the tribal business committee from suit and its status as an indispensable party was disregarded through a use of class action procedure which contravenes this Court's holding in *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506, 512-513?

5. Whether the District Court erred in holding that Congress was forbidden by the Constitution from relying upon the holding of the Court of Claims that "the Indian Claims Commission Act requires that awards be made, not

to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today?" *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971).[1]

6. Whether an Act of Congress, distributing judgment funds and involving a noncontractual, nonvested claim on the public Treasury, must meet the rigorous standards of judicial review applicable to statutes involving criminal procedure, parental custody proceedings, marital and family relations, and other basic liberties of the individual, or whether the more flexible standard of review employed in areas of economic and social benefit legislation is applicable to such an Act of Congress?

7. Whether the holding of the District Court, which, as applied, requires that statutes distributing judgment funds be drafted so as to permit an individualized hearing of, and determination upon, the claim of every person who alleges ancestry in an Indian tribe from the "time of the wrong" is inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 776-785?

8. (a) Whether the District Court erred in adopting as a standard for constitutional review of Indian claims judgment statutes a theory of "but for" causation, inseparably linking the judgment statutes to the theoretical circumstances which could have, but did not, exist, at the "time of the wrong" without regard for any intervening circumstances or events, *e.g.*, by holding that if a sum cer-

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[1] No question is raised as to the power of Congress to disregard this construction of the Act if Congress chooses; the question is whether the Constitution forbids Congress from adopting this construction of the Act if, after consideration, Congress elects to do so.

tain had been paid to the Delaware Tribe in 1854, the Constitution requires a conclusive presumption that this same sum would have been a part of the tribe's assets decades later?

(b) Particularly, whether the District Court erred in holding that the Treaty of July 4, 1866, 14 Stat. 793, 796, by which the ancestors of the present "Kansas Delaware" claimants renounced their Delaware citizenship and right to participate in tribal councils, and assumed United States citizenship and other benefits unavailable, at that time, to tribal Indians, see, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106, was irrelevant because the Due Process Clause commands Congress to conclusively presume "but for" causation in judgment statutes?

9. Whether, regardless of the standard of review employed, the terms of 86 Stat. 762, 763, 25 U.S.C. 1291-1297 are so arbitrary and capricious as to be violative of the Due Process Clause of the Fifth Amendment?

10. Whether the District Court erred in disregarding the congressional policy of distributing Indian claims judgment awards on a basis other than ethnological "tracing" of "blood descendants" from the "time of the wrong" for which the award is made, in the absence of an unequivocal showing that this congressional policy is repugnant to the Due Process Clause of the Fifth Amendment?

11. Whether the District Court properly enjoined the operation of an Act of Congress upon the complaint of parties alleging a monetary taking, rather than dismissing the complaint without prejudice to an action in the Court of Claims?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law . . .

The Act of October 3, 1972, 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 states:

> Pub.L. 92-456; 86 Stat. 762, 763; 25 U.S.C. 1291-97:
>
> "The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.
>
> "The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:
>
> "(a) they were born on or prior to and were living on October 3, 1972; and
>
> "(b) they are citizens of the United States; and
>
> "(c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or
>
> "(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary.

"All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

"(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is

authorized by the tribal governing body and approved by the Secretary of the Interior.

"(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body; *Provided*, That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

"Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

"None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

"The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title."

STATEMENT

Prior to the arrival of European colonists, the Delaware Nation resided in an area stretching from lower New York state to the eastern Mississippi valley of what is now the United States.

In 1793, the Governor of New Spain persuaded some members of the Delaware Nation to move from the present states of Ohio and Indiana to other land in what is now Missouri. English-American settlement continued the dispersing pressure upon the Delawares and forced substantial numbers of Delawares in Missouri to move as far west as the present states of Arkansas, Texas and Oklahoma. While details of this geographical scattering are unavailable, the essence of the situation was that by the end of the first decade of the Nineteenth Century, the Delaware Nation, as a cohesive unit, had ceased to inhabit any one area of land on the North American continent.

In these circumstances, the United States negotiated, in 1818, a treaty, commonly called the Treaty of St. Mary's, 7 Stat. 188, forcing the Delawares to relinquish title to their lands in Indiana in exchange for lands west of the Mississippi River. The larger body of the Delawares eventually removed to this tract of land, located in what is now Missouri, and remained until 1829. J.S. App. p. 11-12; 406 F.Supp. 1309-1317.

In 1829, the Delaware Nation entered into a "supplemental" treaty to the 1818 treaty, 7 Stat. 327. Under the terms of this 1829 treaty, the Delaware Nation exchanged lands in Missouri for a reservation in Kansas which was stated, in the treaty, to be in partial payment for the cession, by the Delawares, of their lands in Indiana.

A substantial number of the Delawares removed to the Kansas reservation and remained there from the third decade of the Nineteenth Century until 1866. A substantial portion of the tribe, however, was forced as far south as Arkansas, Texas and Oklahoma.

In 1854, 1860, and 1866, the United States again entered into treaties with the Delaware Tribe.[2] Under the provisions of the 1854 treaty, 10 Stat. 1048, the Delaware Tribe ceded to the United States a large portion of its Kansas lands. The portion remaining unceded and unoccupied was to be sold by the United States at public auction and the proceeds were to go to the Delaware Tribe, subject to Congress' power to direct distribution of the proceeds in such manner as Congress deemed appropriate. 10 Stat. 1048, 1051.

Contemporary records, introduced into evidence before the Indian Claims Commission and the Court of Claims, demonstrate that the government was acutely aware of the presence of large numbers of the Delaware Tribe southwest of the Kansas Reserve. These records also show that one of the abiding objects of the Principal Chief of the Delaware Nation, Chief William Anderson, was to unite the scattered tribe. The Senate Report relevant to the statute here at issue,[3] distilling the findings of fact made by the Indian Claims Commission, observes that "Anderson, during his long life signed no less than nine Delaware treaties, . . . His entire life is testimony to his efforts to unite his

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[2] The terms "Tribe" and "Nation" are substantially interchangeable in the present context.

[3] S. Rep. No. 1518, 90th Cong. 2d Sess., p. 10.

scattered nation; first on land in Indiana and later on the Delaware Reserve in Kansas. . . ." The Senate Report, describing the status of the southern Delawares, who today comprise the Absentee Delaware Tribe of Western Oklahoma, observed that: "a group of Delawares on its way from Texas to Kansas in 1853 obtained permission from the Choctaw Nation in Oklahoma to stay on its lands as 'tenants at will' reserving the right to move to Kansas at any time."[4] Immediately prior to the negotiation of the treaty of 1854, the Delaware Tribe's members resided throughout the area stretching from the middle part of Kansas to Northern Texas. Although "geographically scattered . . . there was actually a strong inner cohesion; lines of communication were stretched thin but did not break."[5] The cohesiveness is apparent from the fact that one of the Absentee Delawares, John Conner, became Principal Chief of the entire Delaware Tribe while living with the Absentee Delawares on land far south of the Kansas Reserve.[6]

This, briefly sketched, is the situation which existed immediately prior to the time of the negotiation of the Treaty of 1854, 10 Stat. 1048, between the United States and the Delaware Tribe. The essence of the Treaty of 1854, following a familiar pattern, was to remove the Delawares from land which white settlers had come to covet.

As discussed, under the provisions of the 1854 treaty the Delawares ceded to the United States a large portion of their Kansas lands. The portion remaining unceded and

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[4] S. Rep. No. 1518, 90th Cong. 2nd Sess., p. 12.

[5] *Id.*

[6] *Id.*

unoccupied was to be sold by the United States at public auction and the proceeds were to go to the Delaware Tribe, subject to Congress' power to direct disposition of the proceeds in such manner as Congress deemed wise.[7]

In 1860, the government negotiated a treaty with the Delaware Tribe by which all remaining Delaware land in Kansas was to be surveyed; 80-acre plots were to be distributed to members of the tribe; and the remaining surplus lands were to be sold. 12 Stat. 1129. Article IV of this treaty may be mentioned for its demonstration of the contemporaneous understanding of the structure of the Delaware Tribe. It stated:

> "Whereas, some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about 200 of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return, the allotments set apart for them belong to the nation in common." 12 Stat. 1129, 1130-31.

This contemporary recognition of the determination of the Delaware Tribe to remain, as much as possible, unified,

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[7] Article VIII of the Treaty, 10 Stat. 1048, 1051, provided: "Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of such lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body seem just and proper."

has previously been discussed by the Court of Claims, *Delaware Tribe of Oklahoma and Absentee Delaware Tribe of Oklahoma* v. *United States,* 130 Ct.Cl. 782, 788; 128 F.Supp. 391, 399 (1955) and need not be repeated here.

In 1866, pursuant to another treaty, 14 Stat. 793, the Delaware Tribe was required to remove to Oklahoma. Article IX of the Treaty, 14 Stat. 793, 796, contained the "expatriation clause" which has become important here. The clause provided that those Delawares who were demonstrably competent, had established such competence over a period of five years and could so prove to the satisfaction of a United States District Court, could resign from the tribe, renounce any future participation in Delaware tribal councils, accept United States citizenship and accept from the United States a grant of title in fee to an eighty-acre tract of land in Kansas. This provision was especially important to those Delawares who were married to whites, had families and did not wish to remove their families to the Indian Country. The treaty (Art. IX) stressed that the resigning Delawares *"shall cease to be members of the Delaware Tribe, and shall not further participate in their councils nor share in their property or annuities."* 14 Stat. 793, 796. (emphasis added).

Pursuant to Article IX, a registry was prepared of those Delawares who elected to renounce their Delaware citizenship, accept United States citizenship and abandon forever their connection with the Delaware Tribe. The apparent reason for preparation of the registry was that United States citizenship and citizenship in an Indian tribe were, at that time, incompatible. *Elk* v. *Wilkins,* 112 U.S.

94, 103-106. The names of 21 adults appear on this registry.[8] The registry also contains the names of 49 minors who had been born to those adults who remained in Kansas. These children of the expatriated Delawares were formally granted United States citizenship by the Act of June 22, 1874, 18 Stat. 146, 175.

A century later, after the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Oklahoma brought suit in the Indian Claims Commission for breach by the United States of the Treaty of 1854, the Commission, following its determination that the Treaty had been breached through the failure of the United States to sell Delaware lands at public auction in accordance with the provisions of the Treaty, entered a judgment in 1969 for $9,168,171.13.[9]

Congress, thereafter, transformed this final award into the distribution statute, 25 U.S.C. (Supp. IV) 1291-1297, at issue herein.

Appellees, descendants of the "Kansas Delawares", *i.e.*, those who elected to resign from the Tribe and remain in Kansas in 1866, or of children of those resigning Delawares, claim that 25 U.S.C. (Supp. IV) 1291-1297 is void for failure to include them within its distributive provisions. The exclusion came about because Congress determined to limit the distribution provisions to the two federally recognized Delaware Tribes in Oklahoma and to their statutorily-

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[8] The practice of preparing such a registry was, at the time, relatively common. See, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106.

[9] *Delaware Tribe of Indians and Absentee Delaware Tribe of Indians* v. *United States*, 21 Ind.Cl.Comm. 344 (1969).

defined tribal membership. Congress distributed ten per cent of the funds so awarded directly to the two tribal governments to be used for tribal purposes, and employed two rolls, a 1906 payment roll and a 1940 census roll, as the basis for defining membership in the Delaware Tribes. The statute defines as beneficiaries those Delawares whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary of the Interior on April 20, 1906" or those Delawares whose "name or the name of a lineal ancestor is on or eligible to be on the constructed base census role as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior." 25 U.S.C. (Supp. IV) 1292(c).

Appellants herein are members of the governing body of the descendants of those Delawares who lived in Arkansas, Texas and Oklahoma during the middle of the Nineteenth Century; who have maintained tribal identity, having Chiefs and a Tribal Council until the present day. Appellants represent a Tribe which has, since 1957, been federally recognized, with governing documents and a constitution approved by the Secretary of the Interior. J.S. App. 12-13; 406 F.Supp. 1309, 1318.

A majority of the District Court held that the statute was violative of the Fifth Amendment for failure to include the descendants of the expatriated "Kansas Delawares", holding the constitutional question to be one of ancestry in the ancient tribe, traced from the "time of the wrong", rather than federal tribal recognition or tribal membership.

From that judgment, the present appeal has been brought to this Court.

SUMMARY OF ARGUMENT

A. 1. 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 is a statutory plan distributing a judgment of the Indian Claims Commission to the two modern federally recognized Delaware Tribes, as entities, and to those tribal Delawares whom Congress defined, for purposes of the statute, as members of the federally recognized Delaware Tribes. Appellees, t' "Kansas Delawares", are descendants of expatriat wares who long ago elected to resign from the tribe, and the minor children of such expatriates who were accorded United States citizenship in 1874, thereby terminating their tribal membership. *Elk* v. *Wilkins,* 112 U.S. 94. The "Kansas Delawares" contend that despite the expatriation of their ancestors and their lack of membership in either modern tribe, they must, as a constitutional matter, stand on equal footing with members of the contemporary federally recognized Delaware Tribes, as these members were defined by Congress for purposes of this statute, and that their exclusion from the distribution statute was, therefore, violative of the Due Process Clause of the Fifth Amendment.

We submit that the statute here at issue in no way offends the Due Process Clause of the Fifth Amendment.

The "Kansas Delawares' " complaint is a classic illustration of the type of policy making determination regarding Indian tribes which constitutes "essentially a sociological problem, not a legal one," *Northwestern Shoshone Tribe* v. *United States,* 324 U.S. 335, 355 (Jackson, J., concurring) and which is properly resolved by Congress rather than by rigid constitutional rulings under the Due Process Clause. This view accords with the Court's historic reluctance to

attempt to impose judicially fashioned standards upon such an inherently political function as the appropriation of tribal monies to Indian tribes and their members who are under the jurisdiction of the Department of the Interior and the Bureau of Indian Affairs. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308 (congressional power over Indian affairs is "political and administrative in its nature, [and] the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 ("plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.") The present statute falls precisely within the ambit of these holdings. See especially, 25 U.S.C. (Supp. IV) 1294, appropriating ten per cent of the tribe's funds directly to the Absentee Delaware Tribe of Western Oklahoma's tribal government for expenditure "for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior." Moreover, the principles of *Cherokee Nation* and *Lone Wolf* are especially applicable here since the expatriated "Kansas Delawares'" complaint turns crucially upon construction of two treaties between the United States and the Delaware Tribe. Treaty of 1854, 10 Stat. 1048, 1051 and Treaty of 1866, 14 Stat. 793. See especially, Article IX of the Treaty of 1866, 14 Stat. 793, 796, providing that the ancestors of the expatriated "Kansas Delawares" would receive their pro rata share of tribal assets "*then* held in trust" by the government and further providing that the expatriates "shall *cease to be members*

of the Delaware Tribe, and shall not further participate in their councils *nor share in their property or annuities.*" Even assuming it is possible to interpret these treaties in such a way as to conclude that Congress could *allow* the "Kansas Delawares" to share in this distribution statute, nothing in the Constitution *requires* that Congress include these non-members together with the defined members of the two modern Delaware Tribes. See, *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 267-268, 315 F.2d 906, 913-914 (1971) ("The Indian Claims Commission Act requires that awards be made, not to individual descendants of tribal members of the time of the taking, but to the tribal entity or entities today.") The lack of judicially manageable standards for adjudication of the inherently political issues presented by the "Kansas Delawares", and the inappropriateness of circumscribing Congress' plenary power over Indian affairs in the present case is well illustrated by the fact that even the majority of the divided court below, willing to grapple with these questions, was unwilling to grant the relief the "Kansas Delawares" sought, *i.e.*, to include them within this distribution statute. Rather, admitting that the manner of distribution would have to be devised by Congress, the majority below entered a prohibitory injunction vitiating the entire statute. This remission of the entire matter to Congress is itself telling proof of the correctness of Judge Daugherty's dissenting statement that "by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint." J.S. App. p. 80; 406 F.Supp. 1309, 1357. Such contentions as the "Kansas Delawares" may wish to put forth for

allowing them to receive tribal funds or property, despite the terms of the Delaware Treaty of 1866, and their non-membership in the modern Delaware Tribes, are properly presented to the Subcommittees on Indian Affairs of the Senate and the House of Representatives, not to the Judiciary.

2. The funds involved herein are clearly tribal, rather than individual in nature since they redress an injury done to the Delaware Tribe, not to individuals. *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 270-271, 315 F.2d 906, 913-914; *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 458, 490 F.2d 935, 954. And it is well established that Congress may define tribal membership for purposes of a particular statute in a manner which does not precisely coincide with the membership requisites of the tribe. *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 490-491. Congress plainly acted well within its constitutional power in electing not to include a particular blood quantum requirement as a requisite for membership in the Absentee Delaware Tribe of Western Oklahoma for purposes of this distribution statute, and in accepting instead those Delawares who were on or eligible to be on the tribe's 1940 census roll. *Sizemore* v. *Brady*, supra. Such merit as there may be (and we submit there is none) in the "Kansas Delawares" strained theories for their inclusion in any distribution statute to the Delaware Tribes are properly resolved "by appeal to [Congress] . . . not the courts." *Lone Wolf* v. *Hitchcock*, supra, 187 U.S. 553, 568.

Congress plainly acted well within its broad constitutional power over Indian affairs in enacting this distribu-

tion statute and the statutory plan should, therefore, be upheld as an exercise of a congressional function that has historically been confided to congressional judgment. *Stephens* v. *Cherokee Nation*, supra; *Lone Wolf* v. *Hitchcock*, supra.

B. The "Kansas Delawares'" suit seeks to prevent the two federally recognized Delaware Tribes from receiving funds appropriated to the tribes, and the tribal members. The attempt to enjoin this distribution should be held barred by the holdings of this Court in *Turner* v. *United States*, 248 U.S. 354, 358 and *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 512-513 that Indian tribes are immune from suit without congressional consent. The "Kansas Delawares" cannot avoid the force of *United States Fidelity and Guaranty Company's* holding by seeking a declaratory judgment, *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 241; nor can they circumvent these holdings by having a suit certified as a class action. *Eisen* v. *Carlisle and Jaquelin*, 417 U.S. 156, 177. Nor should the "Kansas Delawares" be allowed to do indirectly what they cannot do directly, *i.e.*, engage the tribal governments in litigation over appropriated funds, merely by naming the Secretary of the Interior a party defendant and seeking injunctive relief against him. *Cf.*, *Mine Safety Appliances Company* v. *Forrestal*, 326 U.S. 371, 373-374; *Tewa Tesuque* v. *Morton*, 498 F.2d 240, 242 (10th Cir., 1974); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir., 1975), cert. den. sub. nom. *Susenkewa* v. *Hathaway*, ___ U.S. ___ (March 29, 1976); *Means* v. *Wilson*, 522 F.2d 833, 838 (8th Cir., 1975). Particularly in regard to federally recognized tribes, allowing a suit to proceed against the Secretary of the Interior,

or the Commissioner of Indian Affairs, as a nominal defendant would reduce *United States Fidelity and Guaranty Company's* principled, jurisdictional holding to a form of words. The fact that the Absentee Delaware class, as defined —at the "Kansas Delawares'" instance—by the District Court in its order overruling defendants' Motion to Dismiss and Motion for Summary Judgment, intervened in the companion *Frazier* litigation should not affect a rule which this Court held in *United States Fidelity and Guaranty Company* to be jurisdictional. The years of litigation, and the long history through three District Courts and the Judicial Panel for Multi District Litigation, which this case has taken are forceful testimony to the need for this Court to reiterate the holding of *United States Fidelity and Guaranty Company* in the present context and to forbid that holding to be evaded by the device of naming a government officer as a nominal defendant.

C. 1. The distribution statute challenged by the "Kansas Delawares" follows a familiar pattern in distinguishing between those whom Congress regarded as members of the two federally recognized Delaware Tribes and a group of persons—the "Kansas Delawares"—whose ancestors long ago expatriated themselves from the tribe pursuant to a treaty between the tribe and the United States. See, Treaty of July 4, 1866, Art. IX, 14 Stat. 793, 796 (ancestors of "Kansas Delawares", upon resignation from the tribe, "shall cease to be members of the Delaware Tribe, and shall not further participate in their councils nor share in their property or annuities.") It is settled that Congress' broad power over Indian affairs includes the power to delineate membership in Indian tribes for purposes of a particular statute

so long as the persons included have a relationship to the tribe. E.g., *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813-814 (E.D. Wash.) *affirmed*, 384 U.S. 209. F. Cohen, *Federal Indian Law* (Rev. Ed., 1958) p. 43. Congress' determination to distribute this Delaware Indian Claims judgment to the two modern federally recognized Delaware Tribes, based upon reasonable, objective criteria (two rolls) for defining the tribes' members, was clearly within its expansive constitutional power over Indian affairs. E.g., *Simmons* v. *Eagle Seelatsee*, supra, 244 F.Supp. 808, 814, *affirmed*, 384 U.S. 209. (Congress may draw a line "between . . . those properly to be regarded as continuing members of the Tribe [for purposes of the statute at issue] and those who are not.") A congressional decision to favor federally recognized Indians under the supervision of the Bureau of Indian Affairs over persons who are not members of a federally recognized tribe and who have no contact with the Bureau of Indian Affairs is well within Congress' plenary power in regard to Indian tribes and in no way offends the Due Process Clause of the Fifth Amendment. *Morton* v. *Mancari*, 417 U.S. 535, 552-553 and n. 24. ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. . . . The preference is not directed toward a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense the preference is political rather than racial in nature.") The "Kansas Delawares' " conten-

tion that *Mancari* is limited to the precise facts which were before the Court in that case is without merit. The Court's decisions in *Fisher* v. *District Court*, ... U.S. ....., No. 75-5366 (March 1, 1976) slip opinion at 8-9 and *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ....., No. 74-1656 (April 27, 1976) slip opinion at 15-16, demonstrate that a distinction between those Indians who are considered by Congress to be members of federally recognized tribes and those who are not has vitality as a principled judgment which is, necessarily, broad in its application. The "Kansas Delawares' " suggestion that the principles of *Mancari* and its progeny are limited to legislation affecting reservation Indians is clearly erroneous in the context of the present case. The statute here at issue concerns federally recognized tribes in Oklahoma. The Court has consistently recognized the unique status of BIA supervised Indians in Oklahoma and the absence of Indian reservations within Oklahoma. E.g., *Morton* v. *Ruiz*, 415 U.S. 199, 201, 204, 212, 218-219; *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 718. ("The situation of Indians in . . . Oklahoma has historically been unique." *Morton* v. *Ruiz*, supra, at 212.) See generally, F. Cohen, *Federal Indian Law*, (Rev. Ed.) 985-1051, "Special Laws Relating To Oklahoma."

2. The well established power of Congress to define membership in Indian tribes and to distinguish between those who are to be considered members of federally recognized tribes and those who are not, has special applicability where, as here, Congress' decision excluded from a Delaware claims distribution statute only descendants of expatriated Delawares, and the minor children of such expatriates, who resigned from the tribe and relinquished any

right to be considered members of the tribe more than a century ago. *Halbert* v. *United States*, 283 U.S. 753, 762-763 ("... [i]n the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended.") When considered in conjunction with the fact that the "Kansas Delawares" are not members of either modern federally recognized Delaware Tribe and are not under any supervision of the BIA or other agencies of the Department of the Interior, both the power of Congress to exclude these descendants of expatriated Delawares, and a plainly rational basis for doing so, is clear. See, *Simmons* v. *Eagle Seelatsee*, supra. The "Kansas Delawares' " contention that Congress did not intend to delineate membership in the two federally recognized Delaware Tribes by the statute now at bar, nor to limit distribution to members of these tribes, is refuted by the words of the statute itself. See especially, 25 U.S.C. (Supp. IV) 1294 appropriating ten per cent of the tribes' funds directly to the tribal governments for expenditure "for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior." Finally, the "Kansas Delawares' " argument that Congress was constitutionally compelled to include within a distribution statute all descendants of the ancient tribe, traced from 1854, the "time of the wrong," without regard for intervening historical events, is unsupported by either reason or authority. E.g., *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 268-270, 315 F.2d 906, 913-915. See also, *Weinberger* v. *Salfi*, 422 U.S. 749, 776-778.

D. Whatever independent claims the "Kansas Delawares" contend they might possess against the United States could only be adjudicated in an action before the Court of Claims and in no event would they provide a basis for enjoining the present statute. *Hurley* v. *Kincaid*, 285 U.S. 95; *Regional Rail Reorganization Act Cases*, 419 U.S. 102.

ARGUMENT

I.

APPELLEES' SUIT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

The threshold question for decision is whether the issues framed by the pleadings in the District Court present a justiciable controversy for resolution by the Court. The holding of the majority below that a justiciable controversy was present on the facts presented here is without precedent. The fact that no precedent can be found to sustain appellees' contention is persuasive evidence that the claim appellees present is not justiciable. In *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, the Court reiterated the rule that "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." A majority of the court below held that *Lone Wolf* did not control the present case. Judge Daugherty, dissenting, held that it did; that the case was "within the plenary power of Congress in relation to Indians and not justiciable . . . [since] *Lone Wolf* has not been reversed and the decisions following it are too numerous to cite." J.S. App. 82; 406 F.Supp. 1309, 1353.

The majority below used two sentences to "distinguish" *Lone Wolf* from the case at bar.[10]

But the essence of the District Court's opinion was its view that *Lone Wolf* had been impliedly overruled by the reasoning of *Baker* v. *Carr*, 369 U.S. 186, 210-215; J.S. App. 28-31; 406 F.Supp. 1309, 1326-1327. The latter approach had, at least, the virtue of candor. The purported distinctions between the case framed on the pleadings below and *Lone Wolf* cannot withstand analysis.

Of course, it is obviously true that 86 Stat. 762, 25 U.S.C. (Supp. IV) 1291-1297 does not embody any present policy determination similar to that found in the function of negotiating a treaty. No statute dealing with Indian affairs since 1871 has involved such a policy determination.[11]

Since Indian treaties are a "closed account in the constitutional law ledger,"[12] absence of a policy determination of the sort involved in the treaty making function is an absence found in every statute which has been brought before the Court in this century.

Underlying some of the District Court's reasoning, is, apparently, the inarticulate premise that this particular

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[10]The "distinguishing" sentences are: "There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function . . . [and] However, the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress." J.S.App.p.30; 406 F.Supp. 1309, 1327.

[11]Congress put an end to the practice of making treaties with the Indian tribes by the Act of March 3, 1871, 16 Stat. 544, now codified as 25 U.S.C. 71.

[12]E Corwin, (Ed.) *Constitution of the United States of America, Annotated* (1953) P. 432.

case somehow does not involve the delicate political considerations associated with interpretation of treaties. This is incorrect. The treaty between the United States and the Delaware Nation of July 4, 1866, 14 Stat. 793 upon which appellees base both their present class and their claim of entitlement provided that appellees' ancestors would receive their pro rata share of tribal assets "*then* held in trust by the United States." 14 Stat. 793, 796. The court below, as a predicate to reaching its judgment was required to hold that the phrase "*then* held in trust by the United States" did not mean what it appears to say, i.e., that the word "then" did not have the effect of waiving any future claims which descendants of the resigning Delawares might later assert.

The majority below found this interpretation of the treaty "strained" and invoked the rule that treaties between Indian tribes and the United States are to be construed strictly against the United States.

Passing for the moment the fact that the Court has already this Term held this canon of construction to have no place in a dispute between different classes of Indians, *Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., No. 75-145 (May 19, 1976), slip opinion, n. 7, the fact remains that the District Court was compelled to do what it disclaimed the necessity of doing: interpreting the policy implications implicit in the provisions of a treaty between the United States and the Delaware Tribe.

Indeed, it is scarcely an exaggeration to suggest that the construction which the majority below placed upon the phrase, "then held in trust by the United States" combined

with the majority's concession that both this treaty and the treaty between the United States and the Delaware Tribe, negotiated and ratified in 1854, 10 Stat. 1048, were involved "indirectly in this case" J.S. App. p. 30; 406 F.Supp. 1309, 1327 make a "distinction" between the case at bar and *Lone Wolf*, a distinction without a difference. Surely a distribution statute such as 25 U.S.C. (Supp. IV) 1291-1297 including and excluding certain persons as members of a particular Indian tribe for purposes of a monetary distribution and further determining what proportion of the distribution is to go directly to the tribal governing bodies themselves is quintessentially the type of policy making determination presenting "essentially a sociological problem, not a legal one", *Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 355 (Jackson, J., concurring), which is best fitted for the authority of Congress to resolve, just as it resolved the sociological and cultural problems which formed the essence of *Lone Wolf* v. *Hitchcock*, supra, and such related cases as *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308, and *Sizemore* v. *Brady*, 235 U.S. 441, 447. As *Cherokee Nation* and *Lone Wolf* held, the congressional power to make such determinations is "political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation* v. *Hitchcock*, supra, 187 U.S. 294, 308.[13]

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[13] Of course, as argued at considerable length by defendants below, and as stated by Judge Daugherty in dissent, if a particular piece of Indian affairs legislation is thought to occasion inequity "relief must be sought by appeal to [Congress] for redress, and not the courts." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568.

A second basis of the District Court's rationale for disregarding *Lone Wolf* and its progeny was that the challenged statute did not implicate the "discretionary exercise of the guardianship function [in regard to Indian tribes] by the Congress." J.S. App. 30; 406 F.Supp. 1309, 1327. This is plainly incorrect. 25 U.S.C. (Supp. IV) 1294, by its terms, apportions ten per cent of the funds appropriated to: "*the Absentee Delaware Tribe of Western Oklahoma* . . . to remain to the credit of the Tribe in the United States Treasury, and [such funds] may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of Interior." This is a considerably *more* express exercise of the guardianship function of Congress in regard to Indian tribes than that sustained in *Cherokee Nation* v. *Hitchcock*, supra, and surely a more express determination than that contained in the allotment statute at issue in *Sizemore* v. *Brady*, 235 U.S. 441, 447, where the Court reminded again that Congress "possessed full power . . . to assume full control over them [the tribes] and their affairs, *to ascertain who were members of the Tribe and to distribute the lands and funds among them* . . ." (emphasis added) and a use of the guardianship function as express as that found in the statute at issue in *United States* v. *Jim*, 409 U.S. 80, 82-83.

Since the majority below conceded that there was "an element of such a relationship" in 25 U.S.C. (Supp. IV) 1294, J.S. App. 30; 406 F.Supp. 1309, 1327, the authority of *Lone Wolf, Cherokee Nation, Sizemore* and *Jim*, would seem to lead inexorably to the conclusion that 25 U.S.C. (Supp. IV) 1291-1297, was an exercise of Congress' plenary

power in regard to Indian affairs and, thus, did not present a justiciable controversy for resolution.[14] The majority erred in holding to the contrary.

The District Court misconceived both the reasoning of *Baker* v. *Carr* and the applicability of *Baker's* rationale to *Lone Wolf* and its progeny. *Baker's* dictum regarding the *status* of Indian tribes, derived from quotations contained in *United States* v. *Sandoval,* 231 U.S. 28, 46, was limited to the observation that "Congress may not bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe . . . [because] the courts will strike down any heedless *extension* of that label . . ." 369 U.S. 186, 216-217, quoting *United States* v. *Sandoval*, supra (emphasis added), is merely a re-emphasis of the long established principle that Congress' power over Indian affairs is unique and that it must be limited to those matters which are "distinctly Indian." *Id.* It is undisputed that 25 U.S.C. (Supp. IV) 1291-1297 concerns a matter which is as "distinctly Indian" as any imaginable; that no question of *extension* of the plenary power of Congress to non-Indians is remotely implicated in the present case, and, it follows, that *Baker's* dictum has no place here.

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[14]We raise no question whether appellees' complaint presented a claim "arising under" the Constitution, see, *Bell* v. *Hood,* 327 U.S. 678, nor whether Indians—tribal or non-tribal—may seek judicial review of an alleged deprivation by government of a specific personal right expressly granted by the Constitution, or by federal statute. *Cf., Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661.

Whatever the effect of *Baker's* dictum may be in other contexts,[15] it obviously has no application to this statute, and the reliance of the District Court upon *Baker* as authority for the inference that *Lone Wolf* had been impliedly overruled was erroneous; no case in this Court has suggested, by implication or holding, that the mass of federal case law built upon *Lone Wolf* and reaffirmed time and again since that decision, has been *sub silento*, overruled. But, if the holding of *Lone Wolf* that Congress' power over Indian affairs is "a political one, not subject to be controlled by the judicial department of the government . . ." is, as we submit, still authoritative law, it mandates reversal of the District Court's decision. As Judge Daugherty argued below, and as we have attempted to demonstrate, any "distinction" between the present case and *Lone Wolf* is a distinction of form, not of substance. *Cf., Hicks* v. *Miranda,* 422 U.S. 332, 344-345.[16]

The longstanding holding of *Lone Wolf* and its progeny has, we submit, been a recognition on the part of the Court that certain functions, including decisions involving federally recognized Indian tribes, are so inherently political in their nature, function and purpose that the Judiciary has no principled standards for review and, therefore, that they

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[15]Since *United States* v. *Sandoval*, supra, held that the Pueblos of New Mexico were "Indians" for purposes of federal law, we are aware of no decision in which the question of extension of Congress' plenary power over aboriginal inhabitants of the United States has been raised. *Cf., United States* v. *Native Village of Unalaklect,* 188 Ct.Cl. 1, 411 F.2d 1255 (1969), where the Court of Claims held that Congress intended to include claims by aboriginal inhabitants of Alaska (Eskimos and Aleuts) within the scope of the Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. 70-70v.

[16]J.S. App. 82; 406 Supp. 1309, 1353.

fall within the narrow category of cases which present a "texturally demonstrable commitment" to a coordinate political branch of government. Compare, *Baker* v. *Carr*, 369 U.S. 186, 217 with, *Tiger* v. *Western Investment Company*, 221 U.S. 286, 310-311.

We believe the action of the majority below confirms the correctness of what we perceive to be this Court's historic reluctance to impose judicially fashioned standards upon so intensely political a function as the appropriation of monies from the Treasury to federally recognized tribes. The District Court did *not* grant the relief the "Kansas Delawares" sought; that is, the District Court did not enlarge the pool of beneficiaries of the statute to include the "Kansas Delawares." Rather, the District Court, admitting that "a formula [for proper distribution] will have to be determined by statute", J.S. App. p. 26, n. 22; 406 F.Supp. 1309, 1325, entered a prohibitory injunction voiding the entire statute, including the ten per cent of funds going directly to the Tribe, and leaving its prohibitory injunction in effect so long as Congress has not undertaken to enact amendatory legislation.[17]

Thus, even the court below, willing to grasp the nettles of the uniquely political issue here presented, was unwilling to grant the requested relief, recognizing, we submit, that so inherently political a function is within the province of Congress, not the Judiciary.

Yet, this remission to Congress of the entire issue is itself a forceful indication of the correctness of Judge

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[17]See paragraph 4 of the court's judgment of December 18, 1975. J.S. App. p. 4.

Daugherty's dissenting statement that ". . . by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint." J.S. App. p. 90; 406 F.Supp. 1309, 1357. *Cf., Baker* v. *Carr,* 369 U.S. 186, 215 n. 43: "Chief Justice Marshall's dictum [in *Cherokee Nation* v. *Georgia* (US) 5 Pet. 1, 20] that 'it savours too much of the exercise of a political power to be within the proper power of the judicial department, was . . . addressed . . . to the breath of the claim asserted and the impropriety of the relief sought.' "

We submit that precisely these considerations are present in the case at bar, and that they should lead to a reversal of the unprecedented judgment entered by the District Court.

II.

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA, AND ITS GOVERNING BODY, BEING IMMUNE FROM SUIT, THIS CASE SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT.

Appellants presented, in their Jurisdictional Statement, the question whether the District Court had improperly disregarded the immunity of the tribe from suit, through the device of directing its injunctive process only against appellant Kleppe, as Secretary of the Interior, and entering a judgment which expressly disclaimed being a binding adjudication against the tribes or their tribal authorities, while—at the same time—binding them by binding members of the tribal government as "representatives" of their "class," i.e., the tribe. Because this Court held in *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 512-513 that the immunity of an Indian tribe from suit was a jurisdictional bar, and that it rendered an otherwise valid judgment absolutely void, we continue to urge this point. We do note, however, that appellants intervened—as a class—in the companion *Frazier* case in order to achieve a final adjudication in that cause, and in order not to face re-litigation in the *Frazier* suit of the same issues which were before the Court in the *Weeks* case. In the event the Court is of the opinion that *United States Fidelity and Guaranty Company*, supra, does not stand as a jurisdictional bar in the context of the present case, where there has been intervention, the remainder of the argument under this Proposition may be disregarded. If *United States Fidelity and Guaranty Company's* holding is jurisdictional, and if it should properly be held to be applicable in the circum-

stances here presented, the remainder of the argument in Proposition II is pertinent.

We submit the District Court erred in employing the class action procedures of Fed. R. Civ. Proc. 23(b) (1) (B) and 23(b) (2), and the device of a declaratory judgment to avoid dismissing this action. The essential result is to contravene the Court's holding in *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506, 512-513. The District Court conceded that "Indian Nations are exempt from suit without congressional authorization" and conceded also that a tribe could not be "sued indirectly by suing tribal officers or the United States as trustee or guardian of the tribe." J.S. App. p. 27; 406 F.Supp. 1309, 1325. This concession would seem to have led the District Court to dismiss the complaint on the authority of e.g., *United States* v. *United States Fidelity and Guaranty Co.,* supra, and *Turner* v. *United States,* 248 U.S. 354, 358. The District Court did not do so. The Court's reasoning is best set forth by quotation:

> "The Weeks complaint alleges as to the Cherokee, Delaware and Absentee Delaware Business Committees that each of the members of the committee (being separately named) is a Delaware Indian and that they are each a representative of their respective subclasses, the Cherokee Delawares and the Absentee Delawares." J.S. App. p. 27; 406 F.Supp. 1309, 1326.

After remarking that individuals are not immune from suit because they happen to be of Indian blood, the court held it had the option to "entertain the suit against the individually named Indian defendants, in their individual capacities, and that we may also properly recognize them

as representatives for class action purposes . . . and enter a declaratory judgment of the rights of the individuals constituting the classes." J.S. App. p. 27; 406 F.Supp. 1309, 1326. No authority was cited for this sleight of hand. Indeed, appellees, in their "Motion to Dismiss Appeal"[18] concede that *United States Fidelity and Guaranty Company* "reaffirms the time honored principle that the United States and the Indian Nations *in tutelege* are immune from suit." (emphasis in Motion) Appellees seek to distinguish *United States Fidelity and Guaranty Company* on the ground that the Absentee Delaware Tribe of Western Oklahoma does not meet this criteria and that "no tribal properties or issues relating to the administration of Indian Affairs . . ." are presented here. These suggestions are erroneous.[19]

The existence of the Declaratory Judgment statute, 28 U.S.C. §2201 et seq, a purely procedural device, (and one in existence at the time *United States Fidelity and Guaranty Company* was decided) does not alter the substantive requirement that there be a controversy "admitting of specific relief through a decree of a conclusive character . . . "*Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 241. Yet the majority below was at pains *not* to find a controversy admitting of specific relief through a decree of a conclusive character in regard to appellees as against appellants as an

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[18]Since appellees do not question the jurisdiction of this Court on appeal, nor (obviously) the justiciability of the issues which appellees presented in their complaint in the District Court, this Motion was, presumably, intended to serve the function of a Motion to Affirm. S.Ct. R. 16(c).

[19]Appellees also contend in their Motion that this action meets the *procedural* requirements of Fed. R. Civ. Proc. 23. As noted in the Jurisdictional Statement, p. 12, n. 9 and p. 22, n. 14, this is not in dispute—it is immaterial.

entity: "[w]e grant no relief against the tribes or *their tribal authorities* as such, and our judgment should not be construed as a *binding adjudication affecting them.*" J.S. App. p. 27; 406 F.Supp. 1309, 1326 (emphasis added). Even accepting this reasoning at face value, it cannot explain the District Court's decision to vitiate that portion of the statute which allocates ten per cent of the funds appropriated to the *tribal governing body itself* for use for tribal purposes together with the rest of the statute. The court's denial of these appellants' Motion for Partial Final Judgment as to these funds stated only that the statute "is not severable, and . . . the unconstitutional exclusion thereby of the Kansas Delawares renders the same invalid as a whole." J.S. App. p. 22-23, n. 20; 406 F.Supp. 1309, 1323. The court concluded that all distribution under the statute, must, therefore, be enjoined. We submit this is precisely the reverse of the correct result. Under the authority of *United States Fidelity and Guaranty Company*, and *Turner*, the tribe, and the tribal authorities are immune from suit. If, as we submit, and as the District Court appears to have impliedly conceded, distribution under 25 U.S.C. (Supp. IV) 1294 could not be enjoined, the conclusion would seem to be that no injunction could properly issue. The point may be illustrated by observing that if Congress had elected to distribute all, rather than a specified percentage, of the funds to the tribal governing bodies themselves the principle of *United States Fidelity and Guaranty Company* would, presumably, be an absolute bar to a judgment forbidding the tribal governing bodies from dispensing these funds for tribal use. The fact that Congress here elected to distribute a specified portion of these funds to the statutorily defined tribal members and another specified portion

to the tribal governing bodies should not alter the result.[20] If, as the District Court apparently concluded, it does alter the principle of *Turner* and *United States Fidelity and Guaranty Company*, then these cases will remain viable in the present context only if Congress gives up its practice of distributing Indian Claims judgments partially per capita. The trap is then closed by the District Court's conclusion that the Constitution requires Indian Claims judgments to be paid to all those individuals who are lineal descendants of the ancient tribe, as it was composed at the "time of the wrong," a holding which, as the Solicitor General accurately states, almost surely would "prevent the congressional practice of the distributing a portion of an Indian Claims Commission judgment to the existing tribal governments for common tribal needs . . ." *Kleppe* v. *Weeks*, No. 75-1495, Jurisdictional Statement, p. 11. The net effect would be to leave the immunity from suit granted to Indian tribes by *Turner* and *United States Fidelity and Guaranty Company* a form of words whose substance is easily evaded by a resourceful plaintiff.

The "public policy" which exempts Indian tribes from suit, *United States Fidelity and Guaranty Company*, supra, 309 U.S. 506, 512 would thus be eroded, left a promise to

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[20] As the Solicitor General correctly observes, the lack of precise coincidence between the persons whom the Tribe's constitution specifies as members (those of 1/8 or more blood) and those whom 25 U.S.C. Supp. IV) 1292(c) specifies as members is immaterial. It is settled law that "Congress has the power to specify the persons who are tribal members for purposes of the distribution of tribal funds, as it has done here, *so long as those persons have a tribal relationship.*" *Kleppe* v. *Weeks*, No. 75-1495, Reply Memorandum, p. 3. (emphasis added). This Court has so held on several occasions. See, e.g., *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, *affirming*, 244 F.Supp. 808, 813 (E.D. Wash.).

the ear to be broken to the hope. The importance of maintaining the principle of *Turner* and *United States Fidelity and Guaranty Company* is vividly illustrated by the present litigation: this case arises out of a claim filed with the Indian Claims Commission in 1951 which, six opinions[21] and two appeals later,[22] resulted in a final award in 1969.

Congress, after lengthy public hearings by the House and Senate Indian Affairs subcomittees[23] enacted 25 U.S.C. (Supp. IV) 1291-1297 in 1972; it was signed by the President in 1972; the tribal government made preparations for use of the funds—funds resulting from a claim which had been pending for a quarter of a century. But the tribal government and tribal members found, instead, further litigation. Suit was filed in the District Court for the District of Kansas and, subsequently (but not until after a Temporary Re-

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[21] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 2 Ind., Cl. Comm. 253 (1953); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 3 Ind. Cl. Comm. 622 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 4 Ind. Cl. Comm. 346 (1956); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 8 Ind. Cl. Comm. 150 (1959); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 18 (1969); *see also*, *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 179 (1970); *and Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 468 (1971).

[22] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 130 Ct.Cl. 782, 128 F.Supp. 391 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 192 Ct.Cl. 906, 427 F.2d 1218 (1970).

[23] The hearings of the House Subcommittee on Indian Affairs were presided over by Rep. Edmondson, of Oklahoma; the hearings of the Senate Subcommittee on Indian Affairs were presided over by Senator Bellmon, of Oklahoma—two men who were vitally interested in the propriety of the payment of this judgment since it concerned two Indian tribal groups residing within their own State.

straining Order restraining the operation of this statute had been entered and the case set for pre-trial conference) voluntarily dismissed.[24] Suit was filed in the District Court for the Western District of Oklahoma (appellee Weeks' case); another suit was filed in the District Court for the Northern District of Oklahoma, and, subsequently consolidated with the suit in the Western District (the *Frazier* litigation). In mid 1973, Judge Eubanks, of the Western District of Oklahoma, after notice to the parties, consulted with Circuit Judge Murrah, Chairman of the Judicial Panel on Multi District Litigation, as to whether that Panel should take some action in regard to consolidation. No order of consolidation by the Judicial Panel on Multi District Litigation was entered, however, and instead, the present consolidated suits were allowed to proceed in the Western District of Oklahoma.[25] All this transpired in 1973—it is now 1976 and, still, there has been no distribution under the statute.

We submit this sort of situation is precisely what the Court foresaw in *United States Fidelity and Guaranty Company*, supra, when it referred to the "public policy" considerations which exempt "the dependent as well as the dominant sovereignties from suit without consent . . ." and which "continues this immunity even after dissolution of the tribal government." We believe it is what the Court meant when it held that "the desirability for complete settlement of all issues between parties, must, we think, yield to the principle of immunity" and that "[*t*]*his reason-*

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[24]*Church, et al* v. *Morton, et al,* Civ. No. KC 3696 (D. Kan.)

[25]The Panel did enter an order to show cause to which the parties responded. *In Re Delaware Tribe of Indians,* Docket No. 152 (J.P.M.L.)

ing is particularly applicable to Indian Nations with their unusual governmental organizations and peculiar problems." United States v. *United States Fidelity and Guaranty Company*, supra, 309 U.S. 506, 512-513 (emphasis added).

We believe these principles apply here and that they should have led the District Court to dismiss this suit. In this regard, it may be noted that *United States Fidelity and Guaranty Company* laid down its holding in the hardest possible case: a prior judgment had been obtained in a United States District Court in Missouri, had not been appealed, had become final, and was, therefore, "subject to collateral attack only if *void*." *Id.* (emphasis added). This Court held, despite the obvious equities in favor of the Guaranty Company, that the Missouri judgment was void, and reversed a contrary decision of the court below.

We submit that no material facts distinguish this case from *United States Fidelity and Guaranty Company*. The only differences are differences created by appellees, i.e., appellees named the Secretary of the Interior as a party defendant and had this litigation certified as a class action. The majority below instructed that its injunctive process would run only against the Secretary so as to forbid the Secretary from making distribution under the statute, and held that it would grant no relief, nor any binding adjudication, against appellants as a tribe—instead it would enter a declaratory judgment as to the class.

Does naming of the Secretary of the Interior as a defendant or certification as a class action alter the result reached in *Turner* and *United States Fidelity and Guaranty Company*? We submit that it should not.

Surely the presence of the purely procedural devices of Rule 23 and the Declaratory Judgment Act, do not, and could not, alter the substantive holdings of *Turner* and *United States Fidelity and Guaranty Company*. To say that the statutorily defined membership of the Absentee Delaware Tribe of Western Oklahoma is co-terminous with a defined group of people, and that this defined group is large enough to constitute a class for purposes of Rule 23 is merely a truism. It is something else again to say, as did the court below, that all that is necessary to evade the rule that Indian tribes are immune from suit is to certify the persons whom Congress had denominated members of the tribe as members of a class, obtain service upon individual tribal officers as "representatives" of the "class", and then enter a declaratory judgment determining the rights of the class, as against a private plaintiff.[26]

The District Court's use of Rule 23 amounts to an employment of the Rule to achieve an otherwise impermissible substantive result, i.e., an adjudication "declaratory" of the rights of the tribal members, not as tribal members but as members of a "class." Very recently this Court held that Rule 23 does not even authorize a Court "to conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action." *Eisen* v. *Carlisle and Jaquelin*, 417 U.S. 156, 177. In

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[26]Appellees' suggestion that the Absentee Delaware Tribe of Western Oklahoma does not fit *United States Fidelity and Guaranty Company's* holding because it is not an Indian Tribe "in tutelege" is without merit. Even an *express* termination of federal supervision over Indians by Congress does not affect their status as a Tribe. *Menominee Tribe* v. *United States*, 391 U.S. 404, 410-411, *affirming*, 179 Ct.Cl. 496, 388 F.2d 998.

Eisen, the Court noted that this purportedly procedural device had, in fact, a substantive effect, to-wit, it might result in "a preliminary determination of the merits [to the] substantial prejudice of a defendant. . . ." The Court held that Rule 23 provided no support for such a result. We submit the present appeal presents an *a fortiori* case. It was, at least, a respectable argument that the preliminary evaluation of the merits which the District Court undertook in *Eisen* could be described as a procedural mechanism designed to effectuate the purposes of Rule 23. We submit no serious argument can be made that a holding which materially affects the substantive holdings this Court laid down in *Turner and United States Fidelity and Guaranty Company* could be altered by the procedural mechanism of Rule 23.

Yet, proceeding upon the assumption, which we believe is incontrovertible, that neither the Declaratory Judgment Act nor Rule 23 alters the substantive holdings of *Turner* and *United States Fidelity and Guaranty Company*, the only remaining ground for distinction is the presence of the Secretary of the Interior as a party defendant. We submit that the substantive law of immunity from suit laid down by this Court should not be allowed to be evaded by the stratagem of naming a government officer as a party defendant. See, *Mine Safety Appliances Company* v. *Forrestal*, 326 U.S. 371, 373-374.[27] Just as the government is immune from suit when the action is in essence one for the

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[27]See also, e.g., *Means* v. *Wilson*, 522 F.2d 833, 838 (8th Cir., 1975); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir., 1975), cert. den. sub. nom., *Sustenkewa* v. *Hathaway*, U.S. (March 29, 1976); *Tewa Tesuque* v. *Morton*, 498 F.2d 240, 242 (10th Cir., 1974).

recovery of money from the sovereign, because under such circumstances it is the real, substantial party in interest and is entitled to invoke its immunity even though the suit is nominally brought against government officers, see, *Ford Motor Company* v. *Department of the Treasury*, 323 U.S. 459; *Minnesota* v. *Hitchcock*, 185 U.S. 373, so, also, the tribal government should be allowed to invoke its immunity from suit when the action is in essence one to prevent the payment of money to the tribe which Congress has ordered to be paid. This immunity should not be rendered a mere matter of form by the device of naming a government officer as a defendant and seeking relief against that officer. This point is peculiarly important in regard to federally recognized Indian tribes. The Secretary of the Interior will, in virtually any case involving appropriated funds to a federally recognized tribe, be available as a nominal defendant. If, by chance, the Secretary is not, the Commissioner of Indian Affairs will be available as a nominal party. With a nominal party available—against whom a private plaintiff can request injunctive process—the immunity from suit of federally recognized Indian tribes will, in the present context, be a hollow immunity—one that is no more effective in preventing the disruption of tribal affairs in the future than it has been in the present three years-long litigation.

Appellees suggest that the decision of the Absentee Delaware Tribe of Western Oklahoma to comply with the District Court's Order of November 1, 1974, denying the Motion to Dismiss and the Motion for Partial Summary Judgment of the Defendants below, and granting appellees' request for class action proceedings should be construed as

acquiescence in the action taken below. We submit this suggestion, again, mingles substance with procedure. Once the District Court had determined to overrule both the Motion to Dismiss and the Motion for Summary Judgment, we are aware of no way, short of an appeal from a citation for contempt, by which the correctness of the court's decision could be tested, nor any way in which counsel for appellants could prevent a re-litigation of all the issues presented—in a suit against the tribe—on the ground that a decision which did not name the tribal government or the tribe could not be *res judicata*, unless some action was taken to protect the tribe in the *Frazier* litigation. Therefore, in keeping with the District Court's order of November, 1974, the Absentee Delaware class, as defined by the court, sought and obtained intervention in the *Frazier* litigation. This compliance with the court's order cannot fairly, we submit, be construed as relinquishment of an immunity which this Court held, in *United States Fidelity and Guaranty Company*, to be jurisdictional.

We suggest that the difficult decision to which the tribal government was put, i.e., to intervene—as a class defined by the court—in the *Frazier* litigation and risk having this intervention held to be detrimental, on the one hand and, on the other, to run the risk of relitigating the issues in the *Weeks* case over again in the *Frazier* case, is precisely the sort of situation which the Court sought to prevent with its decision in *United States Fidelity and Guaranty Company*, and that this principled holding should be reaffirmed in the context of the present appeal.

III.

THE DISTRICT COURT HELD THIS INDIAN CLAIMS JUDGMENT DISTRIBUTION STATUTE TO AN IMPROPER STANDARD OF REVIEW.

The District Court conceded that the "Kansas Delawares' " equal protection claims under the Fifth Amendment involved neither a "suspect classification" nor a "fundamental interest." J.S. App. p. 33; 406 F.Supp. 1309-1329. There is, thus, no question of "strict" equal protection scrutiny presented here. Despite this, the majority subjected the statute to a rigorously demanding scrutiny of "means-ends" analysis. Indeed, as the court noted, it obtained, on its own motion a legislative history of this statute through the resources of the Administrative Office of the United States Courts and the staffs of the Congressional Committees concerned. J.S. App. p. 34 n. 25; 406 F.Supp. 1309, 1329. Employing this legislative history, the majority concluded that members of the Congressional Committees on Indian Affairs who drafted the statute at issue did not "intend" to exclude the "Kansas Delawares"; that lack of precise knowledge on the part of the members of the committees who drafted this statute was "disturbing"; that Congress did not "really" mean what the statute it enacted says; and that Congress should be instructed to legislate again. It is important to note that the legislative history of the statute was *not* employed as an aide to its construction for it is clear, precise and needs no construction. Rather, the Court examined this legislative history in an attempt to determine the motives which moved Congress to enact the statute. So far as can be determined from objective evidence, the majority's conclusion as to Congress'

"intent" is dubious. As Judge Daugherty emphasized, and as the majority conceded,

> "Congress had before it another Bill which would have distributed [Indian Claims Commission Docket] 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in [Indian Claims Commission Docket] 337 [25 U.S.C. 1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware tribes in Oklahoma and those on their membership rolls.*" J.S. App. p. 89; 406 F.Supp. 1309, 1357. (emphasis added)

The majority admitted the correctness of Judge Daugherty's statement, J.S. App. p. 34-39, 71-78; 406 F.Supp. 1309, 1330-1332 and 1348-1350, but deduced Congress' motive for so drafting this statute to be exclusion of Munsee Indians, rather than the "Kansas Delawares."[28] The result appears to be as follows: Exclusion of Munsee Indians, and other Indian tribes or groups (whether or not federally recognized tribes) from the distribution provisions of 25 U.S.C. (Supp. IV) 1291-1297 is constitutional since Congress intended the exclusion; on the other hand, exclusion of the so-called "Kansas Delawares" is unconstitutional since Congress did not "really" intend to exclude them.

With the foregoing analysis of what Congress "really" intended to accomplish here, the majority below vitiated the distribution statute to the two federally recognized Delaware Tribes. The holding of first impression below,

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[28]The Munsees are Indians ethnologically related to the Delaware Tribe.

and the extraordinary limitation on Congress' plenary power over Indian affairs which it constitutes, was thus predicated upon the majority's obvious belief that Congress did not intend the result here accomplished. Indeed, appellees, in their Motion to Dismiss Appeal, refute Judge Daugherty's statement solely upon the ground that Judge Daugherty believed "Congress *intended* to excude the Kansas Delawares." Motion p. 26 (Emphasis in Motion.). Appellees themselves rely solely upon the argument that "the 'some people' referred to [by Judge Daugherty] were not the Kansas Delawares but were Munsee Indians whose ancestors were not with the tribe at the time of the wrong . . .". *Id.*

We submit this search for some supposed purpose Congress "really" had in mind is factually useless and legally impermissible.

In *United States* v. *O'Brien*, 391 U.S. 367, this Court upheld the constitutionality of 50 U.S.C. App. 462(b), a statute forbidding a registrant under the Selective Service System from destroying his selective service registration certificate, against a challenge predicated upon the contention that Congress intended, by the statute, to inhibit the freedom of expression secured by the First Amendment. The Court rejected this argument "because under settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional." 391 U.S. at 383. Cautioning that "[i]nquiries into congressional motives or purposes are a hazardous matter . . .", the Court reminded that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional

statute on the basis of an alleged illicit legislative motive." *Id.* In the present case, the District Court did not suggest that Congress had an "illicit" purpose but, rather, that Congress' supposed lack of precise knowledge of *all* the non-federally recognized Delaware Indians who might be excluded from sharing in the distribution under the terms of 25 U.S.C. (Supp. IV) 1291-1297 was "disturbing." J.S. App. p. 39; 406 F.Supp. 1309, 1332. But, "the motives or purposes of Congress" are not a subject of "judicial inquiry in considering the power of that body to enact [a statute]." *McCray* v. *United States*, 195 U.S. 27, 37. And this Court has consistently ruled "frivolous" any attempt to invalidate an Act of Congress which "rests upon the erroneous assumption that the motive of Congress in exercising its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised." *Weber* v. *Freed*, 239 U.S. 325, 330. Yet the majority below inquired with the greatest detail into the motives which it believed moved Congress to enact the statute now at bar. The majority concluded that excluding the "Kansas Delawares" was not among Congress' purposes, on the one hand, and, on the other, that such purposes as Congress had were insufficient. We submit this entire exercise was contrary to the "fundamental principle of constitutional adjudication," *United States* v. *O'Brien*, 391 U.S. at 383, that an inquiry into legislative motive is one not open to the courts, and that the judgment below voiding an Act of Congress—in an area where Congress' power is plenary—on the basis of such an inquiry should be reversed.

IV.

CONGRESS COULD RATIONALLY DECIDE TO LIMIT DISTRIBUTION OF A CLAIMS COMMISSION JUDGMENT TO STATUTORILY DESCRIBED MEMBERS OF THE TWO FEDERALLY RECOGNIZED DELAWARE TRIBES.

25 U.S.C. (Supp. IV) 1291-1297 distributes a Delaware claims judgment to the members of the two federally recognized Delaware Tribes, as membership is defined for purposes of this statute, and to the two federally recognized Delaware Tribes, as entities, for expenditure for common tribal purposes. 25 U.S.C. (Supp. IV) 1292 and 1294. Membership in the tribes is defined by reference to two modern rolls. Membership in the Absentee Delaware Tribe is, for purposes of the statute now at bar, defined by reference to a 1940 base census roll prepared by the Bureau of Indian Affairs, supplemented by a provision allowing those Absentee Delawares whose names were eligible to be placed on the roll, but who were inadvertently omitted by the Bureau of Indian Affairs census, to demonstrate to the Secretary of the Interior that they were eligible to be on this roll. The use of this roll was, as the legislative history shows, urged upon Congress by the tribal government at the hearings of the House and Senate Indian Affairs Subcommittees. As the testimony before the subcommittees demonstrates, the primary purpose for employing this roll, rather than an ethnological standard of lineal descendancy, was the chaos which ensued when Congress allowed a 1968 Delaware claims judgment[29] to be distributed on a lineal descendancy basis. This lineal descendancy provision resulted,

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[29]Indian Claims Commission Docket 337, distributed by 25 U.S.C. 1181-1186.

in Judge Daugherty's accurate description, in "such problems, turmoil, confusion and delay . . . that these funds have not yet been fully distributed!" J.S. App. 86; 406 F.Supp. 1309, 1355. As Judge Daugherty stated, it is "fair to conclude that this change in attitude about distribution in both the [Indian Claims] Commission and the Congress came from the problems which resulted from the earlier distribution and the realization that it was wrong." *Id.* This is sufficient to provide a rational basis for the statute, and a demonstration that the statute was not a product of caprice. Nothing in the Due Process Clause prevents Congress from learning from experience. Especially is this true where Congress is doing no more than selecting a "pattern of distribution" for the payment of an Indian Claims Commission judgment according to criteria which define the "pool of Indians who [are] to benefit from a distribution . . ." *United States* v. *Jim*, 409 U.S. 80, 82; where the benefits accrue to the tribal entities who had prosecuted the claim which formed the basis of the appropriation statute to judgment, and who had appeared before the Indian Affairs Subcommittees of the House and Senate in response to congressional requests to all those who believed themselves interested to appear and give the subcommittees their views. *Cf., Katzenbach* v. *Morgan*, 384 U.S. 641, 653; *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, *affirming*, 244 F.Supp. 808 (E.D. Wash.). Especially in grappling with the necessity of enacting a statute dealing with such complex sociological issues, the admonition of *Jefferson* v. *Hackney*, 406 U.S. 535, 546-47, that "[t]he very complexity of the problems suggest there will be more than one constitutionally permissible method of solving them . . ." is particularly appropriate. *Cf., Northern*

Cheyenne Tribe v. *Hollowbreast*, ... U.S. ..... , No. 75-145 (May 19, 1975), slip opinion, at 6-7.

Congress' determination to distribute this Delaware claims judgment to the federally recognized Delaware tribal Indians, based upon available, reasonable and objective criteria for defining such tribal Indians, was clearly within its expansive constitutional power over Indian affairs. *Morton* v. *Mancari*, 417 U.S. 535, 552-553, and n. 24; *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ..... , No. 74-1656 (April 27, 1976) slip opinion at 15-16. While membership in the Absentee Delaware Tribe of Western Oklahoma, as defined in the tribal constitution, does not precisely coincide with membership in the Absentee Delaware Tribe as specified in 25 U.S.C. (Supp. IV) 1292(c) (2), (the tribal constitution contains a 1/8 blood requirement) this is a distinction without a legal difference. The persons specified in the statutory plan obviously have a close connection to the tribe, being on, or eligible to be on, its 1940 census roll, and Congress could permissibly conclude that their relationship to the tribe was sufficiently substantial to accord them membership for purposes of this statute. This Court has so held on numerous occasions. See, e.g., *Sizemore* v. *Brady*, 235 U.S. 441, 447; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813 (E.D. Wash.) *affirmed*, 384 U.S. 209; *United States* v. *Jim*, 409 U.S. 80, 82-83. Cohen's *Federal Indian Law* succinctly summarizes the governing law:

> "Congress may by law provide for an enrollment of members [in an Indian tribe] *for a specified purpose*. In so providing, it may supersede a tribal determination in the administration of tribal property, particularly its distribution among members of the tribe. *Thus*,

> *the United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property.*"

F. Cohen, *Federal Indian Law* (Rev. Ed., 1958) p. 43 (Emphasis added). And, as Cohen observes, congressional power in this regard includes the power to administer tribal property so as to distribute it only to certain selected tribal members, or even to persons who are not considered by the tribe to be members of the tribe at all. Cohen, supra, at 44-45; see particularly, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 490; *Wallace* v. *Adams*, 204 U.S. 415, 423.

Congress attempted no such drastic action in the statute now at bar. The persons whom Congress included as members of the Absentee Delaware Tribe of Western Oklahoma clearly bear a close connection to the tribe, and the decision to include them provides no basis for the suggestion that Congress was not attempting to limit this distribution to members of the federally recognized Delaware Tribes. Congress' carefully considered and rationally based judgment in enacting this distribution statute has no stain of arbitrariness or caprice about it, and, in an area where Congress' authority is necessarily broad, should be upheld.

Appellees do not question the status of the Absentee Delaware Tribe of Western Oklahoma as a federally recognized tribe, see, *Menominee Tribe v. United States*, 391 U.S. 404, 410-411, nor the power of Congress to distinguish between federally recognized tribes and non-federally recognized non-tribal Indians. In any event, Congress' power to distinguish between the two is settled. *Morton* v. *Mancari*, supra; *Moe* v. *Confederated Salish and Kootenai Tribes*,

.... U.S. ...., No. 74-1656 (April 27, 1976), slip opinion at 15-16.[30]

Congress' authority to draw such distinctions is especially clear in the context of Indian Claims Commission Act judgments for, as the Court of Claims has held, "the Indian Claims Commission Act *requires* that awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today." *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 267-268, 315 F.2d 906, 913-914 (1971).[31] (Emphasis added). As the legislative history shows, and as the District Court acknowledged, this construction of the Indian Claims Commission Act was expressly put before Congress during the hearings on the Bill which eventually became 25 U.S.C. (Supp. IV) 1291-1297 and Congress was strongly urged to follow it. J.S. App. 36-38; 406 F.Supp. 1309, 1330-1333. Unless this construction of the Indian Claims Commission Act is itself unconstitutional—a contention which the "Kansas Delawares" do not even suggest—Congress did

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[30]Since, as noted, the District Court conceded that no suspect classification or fundamental interest was at issue in this case, and since the statute presents no issue of any claim to procedural due process, in the sense of notice and hearing before administrative or judicial action is taken, the majority's reliance upon such cases as *Shapiro* v. *Thompson*, 394 U.S. 618, *Goldberg* v. *Kelly*, 387 U.S. 254, and *Stanley* v. *Illinois*, 405 U.S. 645, J.S. App. pp. 41, 42, 52, 406 F.Supp. 1309, 1333, 1334, 1338, is both inexplicable and misplaced. See, *Morton* v. *Mancari*, 417 U.S. 535, 552-553; *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33-34.

[31]In a related context involving an interpretation of the Indian Claims Commission Act the Court of Claims has remarked that "the biological standard" of Indian blood is virtually useless in determining Indian title for purposes of an Indian Claims Commission Act judgment. *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 436, 490 F.2d 935, 942 (1974).

not exceed its power in so doing. A carefully reasoned interpretation of the Indian Claims Commission Act by the court specially charged with its proper legal construction, is entitled to great respect. *Cf., Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., No. 75-145 (May 19, 1976), slip opinion at 11.

Moreover, Congress' power in regard to the award here at issue exists not only under its broad constitutional power to enact statutes affecting the Indian tribes, but, specifically, under Article VIII of the 1854 Treaty, 10 Stat. 1048, 1051, with the Delaware Tribe which provided that,

> "Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, [i.e., the Delaware trust lands] and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper."

As Judge Daugherty correctly pointed out below, this provision gave Congress "treaty authority with the Delaware Nation . . . to use its wisdom in the distribution of the funds involved herein . . ." J.S. App. p. 84; 406 F.Supp. 1309, 1354. Thus, this distribution statute finds constitutional support under both Congress' broad general power to legislate with regard to Indian tribes and precisely delineated authority stemming from Congress' treaty making power. See, *Holden* v. *Joy*, (U.S.) 17 Wall. 212, 242; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 192. *Cf., Missouri* v. *Holland*, 252 U.S. 416, 433. The statute now at bar concerns, thus, in an area where Congress has extraordinarily broad plenary power, *Northern Cheyenne Tribe* v. *Hollowbreast*,

supra; *United States* v. *Jim*, supra; *Sizemore* v. *Brady*, supra; and Congress did not exceed that power in enacting this patently rational distribution plan for the described members of the two federally recognized Delaware Tribes.

The "Kansas Delawares" seek to distinguish *Morton* v. *Mancari*, supra, and the cases which have followed it,[32] on the grounds that the Absentee Delaware Tribe of Western Oklahoma does not possess a reservation (*Kleppe* v. *Weeks*, No. 75-1495, Motion to Dismiss or Affirm p. 7-11), and that this statutory distribution is not made to federally recognized tribes. (*Absentee Delaware Tribe of Oklahoma Business Committee* v. *Weeks*, No. 75-1335, Motion to Dismiss Appeal p. 5-6). These contentions ignore the unique status of Indian tribes within the State of Oklahoma, a status this Court has long recognized. In *Morton* v. *Ruiz*, 415 U.S. 199, for example, the Court held that federal assistance (Snyder Act) benefits were properly payable to members of Indian tribes who lived near, but not on, a reservation. The Court framed the question for decision as follows:

> "Are general assistance benefits available only to those Indians living *on* reservations in the United States (*or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma*), and are they thus unavailable to Indians (*outside Alaska and Oklahoma*) living *off*, although near, a reservation?" 415 U.S. 199, 201 (Emphasis of words in parenthesis added.).

In discussing the history of the Snyder Act, the Court noted that the Act's benefits are available "to non-reservation

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[32] E.g., *Fisher* v. *District Court*, ___ U.S. ___, No. 75-5366 (March 1, 1976) slip opinion at 8-9; *Moe* v. *Confederated Salish and Kootenai Tribes*, ___ U.S. ___, No. 74-1656 (April 27, 1976) slip opinion at 15-16.

Indians in Alaska and Oklahoma." The reason, as stated by the Court, quoting the Brief of the Secretary of Interior, was that "[t]he situation of Indians in Alaska and Oklahoma has historically been unique." 415 U.S. 199, 212. In reaching its conclusion the Court noted that "the Subcommittee [on Indian Affairs] was advised that Alaska *and Oklahoma Indians* are subsumed in the 'on or near' category . . . and, admittedly, they are entitled to general assistance." 415 U.S. 199, 219 (emphasis added). Indeed, the "Kansas Delawares" themselves emphasize that "[t]here are no Indian reservations in Oklahoma where most of the Cherokee and Absentee Delawares reside; . . .". (*Kleppe* v. *Weeks*, No. 75-1495; Motion to Dismiss or Affirm p. 11.) See generally, F. Cohen, *Federal Indian Law* (Rev. Ed., 1958) p. 985-986 which observes that at least twenty-seven tribes, other than the Five Civilized Tribes, reside in Oklahoma; that these include the Delaware Tribes; and that "the laws governing the Indians of Oklahoma and the applicable decisions are so voluminous that analysis of them would require a treatise in itself." This Court has often recognized the singular status of Oklahoma Indian tribes and the fact that they are under the guardianship of Congress until Congress itself determines to terminate "the guardianship relation." *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 718. The "Kansas Delawares" also contend (Motion to Dismiss Appeal p. 6) that the funds here at issue are individual, not tribal. This is simply not borne out by the distribution statute or by the Indian Claims Commission Act. The close connection between the persons specified in 25 U.S.C. 1292(c)(2) as tribal members and those whom the tribal constitution designates as members, as well as

Congress' power to define those persons who are to be treated as tribal members for purposes of a particular statute, e.g., *Sizemore* v. *Brady*, supra; *Simmons* v. *Eagle Seelatsee*, supra; *United States* v. *Jim*, supra, has already been discussed.

Additionally, the express terms of 25 U.S.C. 1294 demonstrate that Congress treated these funds as tribal in nature. 25 U.S.C. 1294(a) provides that "the Secretary to the Interior shall apportion to *the Absentee Delaware Tribe of Western Oklahoma, as presently constituted*, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to §1292(c)(2) bears to the total number of persons enrolled pursuant to §1292 of this title." (emphasis added.). Finally, since the award here is to recompense the tribe for a wrong done to the tribe, as allowed by the Claims Commission Act, the funds here are clearly tribal, not individual in nature. *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 270-272, 315 F.2d 906, 913-914; *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct.Cl. 426, 458, 490 F.2d 935, 954. Thus, the suggested distinctions between the present case and *Morton* v. *Mancari*, supra, as well as related decisions of this Court, dissolve upon analysis. The funds here at issue are tribal; the distribution is to the two modern federally recognized Delaware Tribes; and Congress was well within its constitutional power in distinguishing between the persons and entities described in the distribution statute and other non-federally recognized, non-tribal descendants of expatriated members of the ancient tribe. *Morton* v. *Mancari*, supra. It is noteworthy that a contrary determination

would have been extraordinary in light of the established rule that

> ". . . in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended."

Halbert v. *United States*, 283 U.S. 753, 762-763. Certainly nothing in the Constitution *required* Congress to enact a distribution statute running flatly contrary to this rule. The "Kansas Delawares' " argument that the Constitution does require such a result is without support in principle or authority. It should be rejected, and this Act of Congress should be upheld as a valid and, indeed, quite well-reasoned statutory plan. *Cf., Simmons* v. *Eagle Seelatsee*, supra, 255 F.Supp. 808, 813-814 (E.D. Wash.), *affirmed*, 384 U.S. 209.

It should not go unremarked that the District Court erred in its construction of the Treaty between the United States and the Delaware Tribe of July 1, 1866. 14 Stat. 793.[33] By its terms Article IX of the Treaty, 14 Stat. 793, 796, provided that the ancestors of the "Kansas Delawares" who resigned from the tribe, took valuable benefits not available at that time to tribal Indians, see, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106, and forever expatriated themselves from the tribe were to forfeit any right to participate in tribal properties in the future. On its face, therefore, the treaty provision precludes the claim the "Kansas Delawares" are asserting

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[33] We have previously discussed the reasons why the District Court erred, we believe, in making any construction of the treaty a basis for its holding.

here The rationale of the majority below for disregarding this provision of the treaty was the rule that treaties between the United States and the Indian tribes are to be construed so as to resolve all doubts in favor of the Indians involved. J.S. App. p. 49; 406 F.Supp. 1309, 1337. This indisputably sound rule has no application here. Already this Term the Court has said that "the canon that 'statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor' . . . has no application [where] . . . the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members." *Northern Cheyenne Tribe* v. *Hollowbreast*, ___ U.S. ___, No. 75-145 (May 19, 1976) n. 7. *A fortiori*, this canon has no application where the contesting parties are an Indian tribe and individual Indians who are not even members of the tribe, but, rather, are descendants of expatriates.

The "Kansas Delawares' argue that they also consist of individuals who are descendants of minor children of the expatriated Delawares. But the minor children of those Delawares who elected to resign from the tribe were also dealt with by Article IX of the 1866 Treaty. Article IX provides that:

> "[a]ll of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which he shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore

> provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family."

The minors were formally granted United States citizenship in 1874 and, at the same time, were issued government patents to land in fee simple, as provided in the terms of the 1866 Treaty. 18 Stat. 146, 175. Neither the adults nor the minors were considered members of the tribe by 1904 when a Delaware claims judgment was distributed and this precise question was carefully considered. See, 25 Op. A.G. 308 (1904) and, 11 Dec. Comp. Gen. 496. The combination of the 1866 Treaty and the 1874 statute clearly terminated the minors as members of the Delaware Tribe. See, *Wilbur* v. *United States, ex rel Kadrie*, 281 U.S. 206, 217; see generally, F. Cohen, *Federal Indian Law*, supra, pp. 43-47 and cases cited therein.

It is, therefore, clear that the "Kansas Delawares," whether descendants of expatriated adults or their minor children have, pursuant to the terms of Article IX of the 1866 Treaty, been without right to claim the fruit of a Delaware tribal judgment. That, indeed, was, perhaps, the primary purpose of Article IX of the Treaty. No canon of statutory construction prevents these words from being read according to their natural sense. So read, they clearly bar descendants of the expatriated Delawares from sharing in this tribal judgment. *Halbert* v. *United States*, supra, 283 U.S. 753, 762-763.

At the very least, Congress could rationally so conclude in enacting this distribution statute to the two modern Delaware Tribes, and, an abundance of rationality justify-

ing the statute being clearly present, the statute's carefully-drawn provisions should be sustained. The contrary decision of the divided court below is plainly in error and should be reversed for the reasons, and upon the decisions of this Court above set forth.

V.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE "KANSAS DELAWARES" HAVE NO VESTED INTEREST COMPENSABLE UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE FUNDS DISTRIBUTED BY 25 U.S.C. (SUPP. IV) 1291-1297; IN ANY EVENT, AN INDEPENDENT JUDGMENT COULD ONLY BE ENTERED BY THE COURT OF CLAIMS IN A DIRECT PROCEEDING AGAINST THE UNITED STATES.

The District Court unanimously held that the "Kansas Delawares" had no vested right in the funds appropriated by 25 U.S.C. (Supp. IV) 1291-1297 which would be compensable under the Just Compensation Clause of the Fifth Amendment. We submit this decision was clearly correct. The funds at issue are, as shown above, tribal property which does not vest in an individual until final absolute distribution. In *United States* v. *Jim*, 409 U.S. 80, for example, the Court held that a 1968 statute enlarging the "pool of beneficiaries" of Navajo Indians in mineral rights on the Navajo reservation did not give rise to a Just Compensation Clause claim by those Navajos who held under a 1933 statute and who found their portion of mineral royalties diminished by the 1968 statute. Holding the 1968 statute constitutional, the Court stated:

> "It is settled that '[w]hatever title the Indians have is in the tribe, and not in the individuals . . .' *Cherokee*

Nation v. *Hitchcock*, 187 U.S. 294, 307; *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127, 136 . . .

> "Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the . . . royalties. . . . This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon the residents of the [Navajo Reservation] by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation." *United States* v. *Jim*, 409 U.S. 80, 82-83.

More recently, in *Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., supra, No. 75-145 (May 19, 1976) the Court held that no violation of the Just Compensation Clause was occasioned when Congress amended an allotment act which provided that after fifty years mineral deposits underlying allotted land would become the property of the respective allottees, to provide instead that the mineral rights would be reserved in perpetuity for the benefit of the tribe. Reversing a contrary decision below, the Court stated:

> "The Court of Appeals erred in its basic approach to construction of the 1926 [allotment] Act. Its view was that Congress must be regarded as having relinquished its control over Indian lands in the absence of an express statement of its intent to retain the power. Just the opposite is true. The Court has consistently recognized the wide-ranging congressional power to alter allotment plans until those plans are executed. [Citations] . . . The extensiveness of this congressional authority, as well as 'Congress' unique obligation toward the Indians,' *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974), underlies the judicially fashioned canon of construction that these statutes are to be read to reserve Congress' powers in the absence of a clear

> expression by Congress to the contrary." *Northern Cheyenne Tribe* v. *Hollowbreast*, supra, slip opinion at 6-7 (footnotes and citations omitted).

In light of these and many other holdings of this Court, the District Court was obviously correct in holding appellees' claims under the Just Compensation Clause insubstantial.

There should be no need to reach the question whether appellees have an *independent* right to maintain an action for compensation in the Court of Claims. The independent right to compensation of a private party provides no justification for enjoining the operation of a statute, so long as Congress has not clearly foreclosed resort to the remedy of an action in the Court of Claims. *Hurley* v. *Kincaid*, 285 U.S. 95; *Regional Rail Reorganization Act Cases*, 419 U.S. 102. In the present case, there is no indicta whatever of any intent on the part of Congress to foreclose any private party from asserting whatever claims he believes himself entitled to in the Court of Claims. It follows, therefore, that any such independent action, based upon the Just Compensation Clause of the Fifth Amendment, would provide no basis for enjoining 25 U.S.C. (Supp. IV) 1291-1297 and that the question is simply not at issue in the present case. *Hurley* v. *Kincaid*, supra.

CONCLUSION

For the reasons set forth above, it is earnestly submitted that the decision of the divided court below should be reversed with instruction to vacate and dismiss its judgment.

Respectfully submitted,

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August, 1976

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on the ..... day of August, 1976, serve three true and correct copies of the above and foregoing Brief on the Merits upon: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Appellees, Dorothy Frazier and Ruth Rattler; Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D.C. 20006, counsel of record for Appellee, Wanda June Weeks; and Mr. Joseph Fontana, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Appellants, Cherokee Delaware Class and named individual members thereof; by placing three copies of the same in the United States mail, postage fully prepaid; I further certify that I did on the 16th day of March, 1976, in conformity with Rule 33, 2(a) of the Rules of the Supreme Court, serve three true and correct copies of the above and foregoing Brief on the Merits upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, postage fully prepaid; I further certify that all parties required to be served have been served; and that service has been made in conformity with Rule 33 of the Rules of the Supreme Court.

Bernard J. Rothbaum, Jr.

Supreme Court, U. S.
FILED
OCT 13 1976
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA
BUSINESS COMMITTEE, ET AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

REPLY BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

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In the

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THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, ET AL.,
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VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

REPLY BRIEF FOR THE ABSENTEE DELAWARE TRIBE BUSINESS COMMITTEE

INTRODUCTION

This Reply Brief is submitted in response to the consolidated Brief filed by Appellees in Nos. 75-1301, 75-1335 and 75-1495.

Insofar as feasible, our reply is limited to only such contentions of the Appellees as are directed toward the Absentee Delaware Tribe of Western Oklahoma whose Business Committee is Appellant herein. We observe, however, that several of Appellees' sweeping claims, while directed largely against the Brief filed in No. 75-1301, necessitate some reply from Appellants herein because of the breadth of the arguments asserted in Appellees' consolidated Brief.

SUMMARY OF ARGUMENT

No little part of the "Kansas Delawares" Brief is mere rhetoric. Thus, the "Kansas Delawares" assert that they are "not outside the protection of the Fifth Amendment just because they have some fractional Indian blood in their veins" (p. 63). No one contends that Appellees are "outside the protection" of the Fifth Amendment. *Cf., Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ....., No. 75-145, decided May 19, 1976. Appellees say that "classifications in statutes must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" (p. 47). No one questions this recitation of hornbook law insofar as it describes discrimination which is "patently arbitrary" or "invidious." *Cf., Mathews* v. *Diaz*, ... U.S. ....., No. 73-1046, decided June 1, 1976. Appellees contend that neither the Delaware Tribe nor the Absentee Delaware Tribe of Western Oklahoma possesses sufficient tribal "infrastructure" to be considered a tribal organization, an argument contrary to the express findings of the District Court. J.S. App. 12, 13, 16 and n. 12. See also, *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 511-512.

What is, perhaps, most striking about the "Kansas Delawares" Brief is what is absent: a single relevant citation to any decision of this or any other Court voiding an Act of Congress enacted pursuant to Congress' plenary power over Indian affairs. This is, no doubt, explicable because the contention that Congress has exceeded its power over Indian affairs, or has impaired vested rights

of individual Indians in tribal property "is one that has often been made in this court and rejected as often as made." *Chase* v. *United States*, 256 U.S. 1, 7. The instant case surely does not present any extraordinary facts which should cause this Court to depart from principles so long followed and so consistently applied. See, *e.g.*, *Sizemore* v. *Brady*, 235 U.S. 441, 447-449.

Since Appellants have contended, in their Jurisdictional Statements and Briefs in this Court, that the "Kansas Delawares" argument for holding 25 U.S.C. (Supp. IV), §§ 1291-1297 unconstitutional ignores the permissibility of a distinction between federally recognized tribes and fully emancipated non-ward descendants of former tribal members, who are not under the supervisory control of, or have any contact with, the Bureau of Indian Affairs, it is hardly less striking that the "Kansas Delawares" do not even *mention*, at *any* point in their Brief, this Court's decision in *Morton* v. *Mancari*, 417 U.S. 535, nor the cases in this Court which have applied the principles of *Mancari* to varying factual circumstances. *Fisher* (Northern Cheyenne Tribe) v. *District Court*, ___ U.S. ___, No. 75-5366, decided March 1, 1976; *Moe* v. *Confederated Salish and Kootenai Tribes*, ___ U.S. ___, No. 74-1656, decided April 27, 1976.

It must be assumed that this studied silence is the result of a realization that this Court's approval of congressional power to distinguish between those whom Congress defines as members of federally recognized tribes under the supervision of the Bureau of Indian Affairs and a racial group consisting of "Indians" is fatal to the "Kansas Delawares" contention that 25 U.S.C. (Supp. IV) §§ 1291-1297

exceeds Congress' extraordinarily broad power over Indian affairs.

It should be borne in mind that the "Kansas Delawares" are not members of the federally recognized Delaware Tribes; that they are, by their own description, fully emancipated non-ward citizens who possess "some fractional Indian blood"; that they are descendants of persons who long ago severed their tribal relations, renounced Delaware citizenship, assumed United States citizenship, and elected to forego forever their right to participate in the Delaware Tribe's councils, property or annuities, or the children of such expatriates whose uncertain status was ended when United States citizenship was conferred upon them in 1875. Article IX, Treaty of July 4, 1866, 14 Stat. 793, 796 and Act of June 22, 1874, 18 Stat. 146, 175.[1]

Appellees, thus, fall squarely within the distinction of *Mancari:* "a racial group consisting of 'Indians' " as compared to "members of 'federally recognized' tribes." *Mancari, supra*, 417 U.S. 535, 553, n. 24. See also, *Fisher* (Northern Cheyenne Tribe) v. *District Court*, ... U.S. ....., No. 75-5366, decided March 1, 1976; *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ....., No. 74-1656, decided April 27, 1976.

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[1] Appellees correctly note that the grant of citizenship to these children in 1875 would not, of itself, divest Congress of its power to legislate in regard to them. *E.g., Hallowell* v. *United States*, 221 U.S. 317. Appellees fail to note, however, that the explicit provision regarding children of the resigning "Kansas Delawares" contained in Article IX of the Treaty, taken together with the Act of 1875, clearly constituted a determination by Congress to end their connection with the Delaware Tribe. *Cf., Sizemore* v. *Brady*, 235 U.S. 441, 447-449.

Since Appellees do not at *any* point in their Brief discuss *Mancari* or its progeny, there is no occasion in the present case for the Court to determine any ultimate limits upon *Mancari*, nor any possible extraordinary situations where its rationale might be inapplicable. We do not suggest that *Mancari, Fisher* and *Moe* are the *sine qua non* of Indian law, regardless of the circumstances of a possible future case; we do strongly urge that they are directly controlling upon the facts presented by instant case, even assuming *arguendo*, that the facts here present a non-political question properly subject to judicial resolution. On the latter point, see, however, *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553.

The "Kansas Delawares" have presented no argument sufficient to justify the unprecedented decision of the divided court below, nor have they cited a single relevant decision of this Court in the area of federal Indian law which supports the judgment of the District Court, and that judgment should not be allowed to stand.

ARGUMENT

I.

A.

RESPONSE TO APPELLEES' "REVISED STATEMENT OF THE CASE"

The "Kansas Delawares" have presented to the Court a reproduction of the Statement of the Case contained in the Brief for the Delaware Tribal Business Committee in No. 75-1301, with deletions and additions thereto. The bulk of the "Kansas Delawares" "Revised Statement of the Case" deals with the relationship of those Delawares who resigned from the Tribe pursuant to Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, and their children, to the Delaware Tribe which resided in the Cherokee Nation of the Indian Territory and, later, the State of Oklahoma.

Since the "Kansas Delawares" assertions scarcely touch upon the status of the Absentee Delaware Tribe of Western Oklahoma whose Business Committee is the Appellant in the instant case, and since little challenge is raised to the Statement of the Case contained in the Brief of the Absentee Delaware Tribe of Western Oklahoma Business Committee, only a short reply statement is necessary from us as to this portion of the "Kansas Delawares" Brief. We note the following:

1. Contrary to the "Kansas Delawares" assertion (pp. 5-6) the funds appropriated and distributed by 25 U.S.C. (Supp. IV) §§ 1291-1297 are not characterizable as assets of the Delaware National Trust Fund created by the Treaty

of May 6, 1854, 10 Stat. 1048. Nothing in the statute gives the slightest indication that Congress intended, in enacting the statute, to revive a "trust fund" which had ceased to exist more than a century before.

2. The "Kansas Delawares" err in stating (p. 7, n. 2) that the Act of June 22, 1874, 18 Stat. 146, 175, did not affect the status of the minor children of the expatriated "Kansas Delawares." By Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, these minors were to elect whether to accept United States citizenship or remain citizens of the Delaware Tribe, upon reaching majority. The statute, by conferring United States citizenship upon these minors, had the effect, in the words of the District Court, of "eliminating the requirement of an election." J.S. App. 17; 406 F.Supp. 1320.[2]

3. No factual support is offered, or is present in the record, to support the assertion (p. 8) that the Delawares "who moved to the Cherokee Nation did so individually and not as a tribe." The contention is negated by the terms of the 1866 Treaty itself. There would have been no need to prepare a registry of those Delawares "who have elected to *dissolve* their *tribal relations* and become citizens of the United States . . ." (14 Stat. 796), if the assertion were correct. We observe that the assertion is also contradicted by Appellees' themselves, on page 19 of their Brief.

4. The argumentative contentions inserted by the "Kansas Delawares" on pages 8 through 10 of their Brief that the Delaware Tribe ceased to exist as a tribal entity

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[2] References to "J.S. App." are to the Appendix to the Jurisdictional Statement of Appellants herein.

in 1895 are not only unsupported by the record, but are, in fact, contrary to the express findings made by the District Court on this point: "The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares. . . . We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having chiefs and business committees continuously until the present time." J.S. App. p. 16, n. 12; 406 F.Supp. 1320, n. 12.

5. Likewise, the Absentee Delaware Tribe of Western Oklahoma has "maintained group identity, having chiefs and a tribal council up to the present time." J.S. App. p. 12; 406 F.Supp. 1318.

6. Contrary to the assertion (p. 14) of the "Kansas Delawares", the legislative history of the statute was not obtained solely because Appellants contended that the exclusion of the "Kansas Delawares" was "conscious." The apparent motivating force which moved the District Court to obtain this legislative history, on its own motion, was the "Kansas Delawares" insistence that Congress did not "really" understand the effect of the statute here at issue; that Congress did not "really" intend to exclude them; and that this was a case of legislative oversight.

7. Since no question as to statutory construction is before the Court, we do not respond to the "Kansas Delawares" deductions from the legislative or administrative history of the statute—they are immaterial to the question for decision: whether the statute is constitutional as it is written.

B.

REPLY TO "ADDITIONS TO STATEMENT"

1. The "Kansas Delawares" correctly note (p. 18) that Article XIII of the Treaty of May 6, 1854 uses the phrase, "Delaware people". In addition, the Treaty uses the term "Delawares", without further description. The "Kansas Delawares" do not point to any factual difference which would result from any subtle changes in terminology in the 1854 Treaty, and we suggest there is none.

2. The "Kansas Delawares" err in suggesting that the Treaty of July 1, 1860, 12 Stat. 1129, is relied upon by the Absentee Delaware Tribe of Western Oklahoma as a basis for their inclusion within the terms of 25 U.S.C. (Supp. IV) §§ 1291-1297. Rather, as clearly stated in our original Brief (p. 12), Article IV of the Treaty was referenced for its "demonstration of the contemporaneous understanding of the structure of the Delaware Tribe."

3. We agree with the assertion (p. 19) that the Delaware Tribe agreed to move to the Indian Territory *"as a tribe."* This correct statement by the "Kansas Delawares" directly contradicts their erroneous statement, on page 8 of their Brief, that the Delawares removed to the Indian Country *"individually and not as a tribe"*. (emphasis in original).

C.

RESPONSE TO STATEMENT OF "STATUS OF CHEROKEE AND ABSENTEE DELAWARES AND RELATIONS OF KANSAS DELAWARES TO SUCH GROUPS"

1. The "Kansas Delawares" contention (p. 12) that the Delaware Tribe ceased to exist as a tribe in 1895 is, as previously noted, directly contradicted by the express findings of the District Court to the contrary on this precise question. J.S. App. p. 16, n. 12; 406 F.Supp. 1320, n. 12.

2. The argumentative assertion as to the purpose of the 1906 Delaware payroll, and the opinion of the Comptroller of the Treasury, 11 Dec. Comp. Gen. 496 (1905), is in error insofar as it suggests that ancestors of the Absentee Delaware Tribe of Western Oklahoma would have been included on this payroll if the roll had been intended as a roll of all tribal Delawares as of 1905. The purpose of the payroll was, as the Comptroller General plainly stated (11 Dec. Comp. Gen. 496, 500-501), to prepare a roll of those Delawares who were resident in the Cherokee Nation and, therefore, were still members of the Cherokee Delaware Tribe. These are the Delawares who presently constitute the Delaware Tribe of Oklahoma—a separate and distinct entity from the Absentee Delaware Tribe of Western Oklahoma. It is factually settled that the two modern tribal entities spring from sources which, as of approximately 1829, are discrete.

3. The "Kansas Delawares" err in stating (pp. 24-25) that the claims attorney for the two Delaware Tribes "assured" Congress that use of the 1906 and 1940 rolls would not exclude any members of the tribe as it existed

in 1854. The attorney responded to the question of Rep. Edmondson, Chairman of the Subcommittee on Indian Affairs of the House of Representatives, by stating he did not *believe* such persons existed, and by noting immediately thereafter that the Bureau of Indian Affairs held a contrary opinion on the subject. J.S. App. 70; 406 F.Supp. 1348. We note in passing that we believe this point to be wholly immaterial to the constitutionality of the statute, and we pause to make the correction only because the "Kansas Delawares" rely so heavily upon the "legislative history" of the statute as a predicate for attacking is validity.

4. We do not attempt to determine whether all the assertions as to a proposed "administrative construction" of the statute, after its enactment, (pp. 25-26) are supported by the record information contained in the appeal file of Wanda June Weeks, since we believe it clear that these assertions are probative of no issue pertaining to the constitutionality of the statute as it is written.

II.

A.

RESPONSE TO ARGUMENT UNDER PROPOSITION I(A)

The contentions put forth in Proposition I (A) merely disclose what no one disputes—the instant case and *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, do not involve precisely identical facts and are, therefore, "distinguishable" in the sense that any two legal disputes may be "distinguished" from one another. Nothing said by the "Kansas Delawares," and nothing contained in any of the cases cited provides the structure for a genuine difference in legal principle between the present case and *Lone Wolf*.

It was to this "distinguishing" of *Lone Wolf* that Chief Judge Daugherty bitingly objected when he wrote that "*Lone Wolf* has not been reversed and the cases following it are too numerous to cite." J.S. App. p. 82; 406 F.Supp. 1353.

The assertion (p. 33) that there is no problem regarding lack of discoverable and manageable standards for resolving the questions presented by this case, and the supposed lack of need for an initial policy determination of a kind clearly for non-judicial discretion, is refuted by the very contentions contained in Part IB of the "Kansas Delawares" Brief; *i.e.*, the degree of "tribal infrastructure" (p. 36) necessary in order to meet the requisites which "should" allow an Indian Tribe to be qualified by the Department of the Interior as a federally recognized tribe. This is clearly a policy determination of a type best suited to the judgment of the Executive Branch, based upon consistent experience, rather than the episodic event of litigation.

We suggested, in our original Brief, that the District Court's reasoning was based primarily upon its assumption that *Lone Wolf* had been substantially overruled, *sub silento*, by *Baker* v. *Carr*, 369 U.S. 186, 215-217. The "Kansas Delawares" characterize this argument as "somewhat audacious." The characterization is better applied to the reasoning of the majority below. Chief Judge Daugherty plainly shared this view. As noted, Judge Daugherty answered the contention of the majority below when he stated that *Lone Wolf* "has not been reversed and the decisions following it are too numerous to cite." J.S. App. 82; 406 F.Supp. 1353.

B.

THE CONTENTION THAT THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA IS NOT "AN INDIAN TRIBE" WITHIN THE MEANING OF THE CONSTITUTION IS WITHOUT MERIT.

The argument at pages 34-38 of Appellees' Brief (Part IB) that the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma lack sufficient elements of "infrastructure"—a term the "Kansas Delawares" carefully do not attempt to define—to properly constitute Indian Tribes is, as previously noted, refuted by the express findings of the District Court, J.S. App. 12-13, 16, n. 12, and, obviously, contrary to this Court's holding in *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, that "the public policy which exempted the dependent as well as the dominent sovereignties from suit without consent continues this immunity even after dissolution of the tribal government," 309 U.S. 506, 510-511, as well as the long line of decisions in the Courts of Appeals, some of which the "Kansas Delawares" themselves recognize on page 40 of their Brief. *E.g.*, *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. den.* 356 U.S. 906; *Fondahan* v. *Native Village*, 450 F.2d 520 (9th Cir. 1971); *Baciarelli* v. *Morton*, 481 F.2d 610 (9th Cir. 1973); *Tewa Tesuque* v. *Morton*, 498 F.2d 240 (10th Cir. 1974); *Means* v. *Wilson*, 522 F.2d 833 (8th Cir. 1975); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. den. sub nom.*, *Susenkewa* v. *Kleppe*, ... U.S. ..... (March 29, 1976).

Additionally, the "Kansas Delawares" contentions in this portion of their Brief are obviously inconsistent with

the Court's decisions in *Morton* v. *Mancari*, 417 U.S. 535, 552-553 and n. 24, as well as the cases which have applied *Mancari's* clear distinction between "a racial group of 'Indians' " and "members of 'federally recognized' tribes." *E.g.*, *Fisher* (Northern Cheyenne Tribe) v. *District Court*, ... U.S. ... , No. 75-5366, decided March 1, 1976; and *Moe* v. *Confederated Salish and Kootenai Tribes*, ... U.S. ... , No. 74-1656, decided April 27, 1976. As discussed *supra*, *nowhere* in their Brief do the "Kansas Delawares" even *mention* *Mancari*, or the cases which have followed it. The studied silence speaks volumes.[3]

Finally, and of particular importance to the appeal in this case, we emphasize that the "Kansas Delawares" do not mount a serious challenge to the decision of the Secretary of the Interior to have recognized for two decades the Absentee Delaware Tribe of Western Oklahoma as an Indian Tribe within the meaning of Article I, section 7, cl. 3 of the Constitution. In view of the evidence in the record

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[3] Neither of the cases cited (p. 37) by the "Kansas Delawares" on this point gives support to their position. In *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 388 F.Supp. 649 (N.D. Maine, 1975), *affirmed*, 528 F.2d 370 (1st Cir. 1975), the court held that the refusal of the Secretary of the Interior to recognize a long extant Indian Tribe was arbitrary and capricious in view of the express terms of the Indian Non-Intercourse Act, 25 U.S.C. §177. *United States* v. *State Tax Commission of Mississippi*, 505 F.2d 663 (5th Cir. 1974), contains a dictum to the effect that the Treaty of Dancing Rabbit Creek, Treaty of September 27, 1830; 7 Stat. 333, abrogated the status of Choctaw Indians *in Mississippi*; that the Secretary of the Interior could not, therefore, recognize a band of Choctaw Indians in Mississippi as a federally recognized tribe and, *by such action alone*, grant them immunity from state taxation. Since the case is plainly not in point, we need not give it lengthy consideration. However, we do note that the dictum is subject to serious question in light of this Court's recent decision in *Bryan* v. *Itasca County*, ... U.S. ... , ... and n. 2, No. 75-5027, decided June 14, 1976.

(see, Joint Appendix, pp. 64-71) and the express findings of the court below, the "Kansas Delawares" reticence in challenging the tribal status of the Absentee Delaware Tribe of Western Oklahoma is understandable.

C.

APPELLEE'S CONTENTION THAT 25 U.S.C. (Supp. IV) §§ 1291-1297 DOES NOT AFFECT THE STATUS OF FEDERALLY RECOGNIZED TRIBES IS IN ERROR

In Part IC and the latter Part of IB, of Appellees' Brief, where Appellees finally come to grips with the fact that Appellants in both No. 75-1335 and No. 75-1301 are the Business Committees of the two federally recognized Delaware Tribes, their entire argument is devoted to the contention that Congress did not "intend" to define membership in the two Delaware Tribes through use of the two tribal rolls employed in 25 U.S.C. § 1291(c)(1) and § 1291(c)(2). The theory of the "Kansas Delawares" is directed toward statutory criteria established by 25 U.S.C. § 1291(c)(1). This is the criteria for the Delaware Tribe of Indians, *not* the Absentee Delaware Tribe of Western Oklahoma, Appellants herein. The Absentee Delaware Tribe of Western Oklahoma's membership and eligibility criteria are established by 25 U.S.C. § 1291(c)(2).

Significantly, the "Kansas Delawares" dwell upon the existing structure of the Delaware Tribe of Indians *only*, carefully avoiding a challenge to the Absentee Delaware Tribe of Western Oklahoma. For this reason, we merely note that the only difference between the definition of membership contained in the constitution of the Delaware Tribe of Western Oklahoma and that contained in 25 U.S.C.

§ 1291(c)(2) is that the tribal constitution contains a 1/8th blood requirement. As demonstrated in our original Brief, Congress possessed ample power to define membership in the Absentee Delaware Tribe of Western Oklahoma as it did here. The only requisite for a proper statutory delineation of tribal membership is that the statute include Indians who have a substantial relationship to the tribe. See especially, *Sizemore* v. *Brady*, 235 U.S. 441, 447 and *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813-814, *affirmed*, 384 U.S. 209; see also, *Morton* v. *Mancari*, 417 U.S. 535, 553 and n. 24.

The bald statement by the "Kansas Delawares" that Congress did not here "intend" to define membership in the modern day Delaware Tribes is conclusively negated by the express terms of the statute itself. Here again, the silence of the "Kansas Delawares" is eloquent. We note that not a single decision of this Court, or any other court, is cited by Appellees in support of the argument in part IC of their Brief. This is unsurprising. The decision of this Court most nearly in point—*Morton* v. *Mancari*, 417 U.S. 535, 553 and n. 24—cuts squarely against the contentions put forward by Appellees. Thus, 25 U.S.C. § 1293 instructs that no application for enrollment shall be finally denied until it has been reviewed by a Committee of the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma, and further provides that the Committee shall notify the Area Director of the Bureau of Indian Affairs, in writing, regarding its decision on all applications for enrollment.

Yet more strikingly, 25 U.S.C. § 1294(a), by its terms, directs that ten per cent of the funds appropriated shall be

apportioned "*to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, . . .*" These funds are to be "advanced, expended, invested or reinvested for any purpose that is *authorized by the tribal governing body* and approved by the Secretary of the Interior." (emphasis added).

As observed in our original Brief (pp. 37-38), and by the Secretary of the Interior in No. 75-1495, pp. 32-33, n. 33, Congress might well have appropriated the entire fund, rather than ten per cent, directly to the Absentee Delaware Tribe of Western Oklahoma, with the proviso that the Tribe should then distribute ninety per cent of the funds appropriated to its members, either as defined by reference to the 1940 base census roll (25 U.S.C. § 1291(c)(2)), or by reference to the tribal constitution. The "Kansas Delawares" do not offer any substantial argument that such a statute would have been subject to constitutional attack and the District Court tacitly conceded that such a statute would raise no constitutional issue. J.S. App. pp. 25-26, n. 20, pp. 22-23 and n. 23.

It defies belief that the constitutional result must change because Congress elected to distribute a portion of the funds directly to the defined tribal members and another portion, rather than all, to the tribal governments.[4]

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[4] Appellees contend, belatedly, that the Delaware Tribe of Oklahoma Appellant in No. 75-1301, did not conform to the terms of 25 U.S.C. §1301 *et seq.* in adopting its constitution insofar as that Act imposes procedural requirements upon the adoption of a tribal constitution. While obviously irrelevant here, the short answer is that if there be any merit in this contention, the "Kansas Delawares" are limited to invoking the remedies provided in that Act, not to attacking the constitutionality of 25 U.S.C. (Supp. IV) §§ 1291-1297. See, for an analogous case, *Daly* v. *United States* (Crow Creek Sioux Tribe), 483 F.2d 700 (8th Cir. 1963).

At all events, it is patent from the express words of the statute, including particularly §§ 1293 and 1294 that Congress knew it was dealing with federally recognized Delaware Tribes; that Congress effectuated the distribution of this judgment to the modern tribal entities, in a manner analogous to many other distributions (see, statutes cited in Brief for the Secretary of the Interior, No. 75-1495, p. 23, n. 23), and in conformity with the construction of the Indian Claims Commission Act—*expressly* put before Congress in the Hearings conducted by the House and Senate Subcommittees on Indian Affairs when this statute was being drafted—that "the Indian Claims Commission Act requires that awards be made, *not* to individual descendants of tribal members at the time of the taking, but to *the tribal entity or entities today.*" *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 267-268, 315 F.2d 906, 913-914 (1971) (emphasis added).

The bare assertions that Congress did not "really" mean what the statute it enacted says, or that Congress did not "intend" to do something (distribute this judgment to federally recognized Delaware Tribes) when the terms of the statute itself refute such a contention are untenable. These sweeping assertions—unsupported by any citation of authority—furnish no reasoned argument upon which to vitiate a Statute of the United States. *Cf.*, *Mathews* v. *Diaz*, U.S. , No. 73-1046, decided June 1, 1976: ". . . the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will *at once* invalidate that line and yet tolerate a different line separating some [part of a class] from others" (emphasis added).

Precisely like *Diaz*, the instant case "involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind" and here, as in *Diaz*, ". . . appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, [and, therefore] they have, in effect, merely invited us to substitute our judgment for that of Congress. . . ." Here, as in *Diaz*, we submit the Court should "decline the invitation." ... U.S. ..., ...

D.

NO QUESTION REGARDING THE *PROCEDURAL* REQUISITES OF A CLASS ACTION IS AT ISSUE IN THIS CASE

At pages 41-43 of their Brief the "Kansas Delawares" argue what is not denied: that this action meets the *procedural* requisites of a class action under Rule 23, Fed. R. Civ. Proc.

As the "Kansas Delawares" correctly note (p. 42), the tribal Business Committee moved to dismiss the Complaint on the ground of the immunity of the Tribe, a substantive question of federal law unaffected by the procedural device of a class action, or the invocation of the Declaratory Judgment Act.

We stated in our original Brief, and repeat here, that if the Court is of the opinion the question of immunity was waived by the decision of the class, as defined by the District Court, to intervene in order to obtain a judgment which would put this long-litigated case to rest, the question of tribal immunity may, and should, be disregarded.

E.

A FACIALLY VALID STATUTE CANNOT BE VITIATED ON THE GROUND IT DOES NOT CONFORM TO THE "LEGISLATIVE OBJECT" OF CONGRESS

Sections II(A) and II(B) of the "Kansas Delawares" Brief contain as their indispensable predicate or, in Appellees' own words, "critical step" (p. 44) the argument that 25 U.S.C. (Supp. IV) §§ 1291-1297 is unconstitutional given the "legislative purpose for which the statute was enacted." The contention is that there was only one permissible "legislative purpose" for which Congress *could* have enacted 25 U.S.C. (Supp. IV) §§ 1291-1297 and that this legislative purpose may only be derived *not* from the terms of the statute itself, but rather from the supposed "legislative purpose" of the Indians Claims Commission Act, 60 Stat. 1049-1055, 25 U.S.C. §§ 70-70(v).

By thus predicating the constitutionality of the statute upon Congress' supposed object in enacting it; then announcing that there is only one "permissible" object for which the statute could be enacted; and then finding that the statute does not meet the "criteria" of the supposed "object," the "Kansas Delawares" reach the conclusion that the statute must violate the Due Process Clause.

This contention should not be accepted as a basis for voiding an Act of Congress which is, on its face, valid.

The first prong of the argument, *i.e.*, that a statute valid on its face may be voided by positing a single "congressional purpose" and then concluding that the statute does not suit the purpose is untenable. Significantly, no decision of this, or any other, Court is cited in support of such a contention. Indeed, even in construing Acts of Con-

gress to determine their proper application, this Court has refused to read into a specific statute an allegedly "immanent" meaning. *Utah Junk Company* v. *Porter, Administrator*, 328 U.S. 39, 43-44. Since the Legislative Branch may have more than one "purpose" in enacting any statute, or may feel one purpose more acutely than another, " 'a statute is not invalid under the Constitution because it might have gone farther than it did. . . .' " *Katzenbach* v. *Morgan*, 384 U.S. 641, 657, quoting, *Rochen* v. *Ward*, 279 U.S. 337, 339. With the exception of *Morey* v. *Doud*, 354 U.S. 457, "the only case in the last half-century to invalidate a wholly economic regulation solely on equal protection grounds, . . ." this Court has consistently recognized broad legislative discretion—absent a suspect classification or a fundamental interest upon which a particular statute impinges—in which to enact classification statutes. *New Orleans* v. *Dukes*, ___ U.S. ___, No. 74-775, decided June 25, 1976, *overruling, Morey* v. *Doud, supra*. These principles are, of course, fully applicable to the statute now at bar (even considered apart from Congress' plenary power over Indian affairs) and we would add only that the lengths to which Appellees must strain for their "legislative purpose" argument are enhanced by the fact that they rely, not merely upon the legislative history of 25 U.S.C. (Supp. IV) §§ 1291-1297 to vitiate the statute, but, rather, upon the legislative history of the Indian Claims Commission Act (pp. 44-48).

The second prong of the argument, *i.e.*, reading a notion of "congressional object" into a statute, on the basis of the legislative history of another statute, is a dubious procedure even when the question before the Court is the proper construction of a statute. The argument that this sort of "inter-

pretation" may be used to hold a facially valid statute unconstitutional is refuted by many decisions of this Court. See, *e.g.*, *Weber* v. *Freed*, 239 U.S. 325, 330; *United States* v. *O'Brien*, 391 U.S. 367, 383.

Even considered on Appellees' own terms, however, their argument fails to demonstrate that the statute at bar violates the Due Process Clause. We would, in this regard, invite the Court's particular attention to the fact that: "Congress had before it another Bill which would have distributed [Indian Claims Commission Docket] 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in [Indian Claims Commission Docket] 337 [25 U.S.C. §§ 1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls.*" J.S. App. 89; 406 F.Supp. 1357 (Daugherty, J., dissenting).

Since the bulk of Appellees' argument for holding, 25 U.S.C. (Supp. IV) §§ 1291-1297 turns upon the flawed premise that "in view of the legislative purpose for which the Congress enacted the statute" (p. 47) the statute must be held unconstitutional, Appellees' conclusion is equally flawed. The statute, valid on its face, may not be vitiated by such reasoning as Appellees put forth.

The claim (pp. 53-54) that 25 U.S.C. (Supp. IV) §§ 1291-1297 is unconstitutional because it includes within its terms persons who do not have any affiliation with modern-day tribal entities is plainly incorrect. The statute expressly limits distribution to those who are on, or eligible

to be on, the 1940 base census roll of the Absentee Delaware Tribe of Western Oklahoma; expressly provides for representation by the tribal government in the distribution process; and expressly provides that ten per cent of the funds distributed are to go to the Absentee Delaware Tribe of Western Oklahoma for use by the tribal government. 25 U.S.C. §§ 1293, 1294.

Appellees' assertion (p. 54) that the Absentee Delaware Tribe of Western Oklahoma and its members are not "wards of the nation" is plainly erroneous. The Tribe is, and has been for many years, a federally recognized tribe, receiving numerous tribal services from the Bureau of Indian Affairs and other agencies of the Departments of Interior, Agriculture, and Health, Education and Welfare.

The "Kansas Delawares" suggestion that the "right of an Indian to membership in his tribe is a valuable right which cannot be terminated except by a clear and unequivocal Act of Congress" (p. 55) is unsupported by citation of relevant authority and, even assuming, *arguendo*, that it may have merit in some contexts, Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, and the Act of June 22, 1874, 18 Stat. 146, 175, taken together, clearly constituted such a termination insofar as the "Kansas Delawares" are concerned. *United States* v. *Kagama*, 118 U.S. 375, 383; *Nagle* v. *United States*, 191 Fed. 141 (9th Cir., 1911). See generally, F. Cohen, *Federal Indian Law*, pp. 4-12 (Rev. Ed., 1958).[5]

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[5] That such termination does not lessen the power of Congress to enact special laws (for example, allotment and liquor control statutes) applicable in "Indian country" is irrelevant here. For this reason, Appellee's reliance upon such cases as *Hallowell* v. *United States*, 221 U.S. 317, and its progeny (p. 55) is misplaced.

F.

THE DELAWARE TREATY OF 1866 VESTED NO CONSTITUTIONAL RIGHT TO THE FUNDS AT ISSUE IN THE "KANSAS DELAWARES"

The "Kansas Delawares" rather remarkable contention that the District Court did not conclude that "the Constitution requires Indian claims judgments to be paid to all those individuals who are lineal descendants of the ancient Tribe, as it was composed at the 'time of the wrong'" (pp. 60-61) is inexplicable. It was upon precisely such reasoning that the "Kansas Delawares" have based their claim from the time of the filing of their Complaint (Complaint, Para. 16; Joint Appendix p. 11) and it was this reasoning which the District Court accepted in holding that Congress had exceeded its plenary power over Indian affairs in excluding the "Kansas Delawares" from the distribution provided by 25 U.S.C. (Supp. IV) §§ 1291-1297. Indeed, unless a rationale derived from the concept of payment to lineal descendants of those who were members of the Tribe at the "time of the wrong" is accepted as the basis for the "Kansas Delawares" argument, their argument ceases to possess intelligibility.[6]

The rationale of distribution from the "time of the wrong" is unacceptable, however, since, in addition to other reasons already discussed, the provision in Article IX of

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[6] Plainly, Appellees' argument rests on the premise that the Constitution requires distribution to all persons who are descendants of the ancient tribe. Appellees state, for example, that use of a 1906 payroll cannot be "a rationale to exclude the Kansas Delawares from a roll to be prepared to compensate for a wrong which was suffered by *their tribal ancestors when those ancestors were with the tribe.*" (p. 50; emphasis added.)

the Treaty of July 4, 1866, 14 Stat. 793, 796, under which the ancestors of the "Kansas Delawares" received their proportionate share of the assets "*then* held in trust" could not, on any theory, vest in the "Kansas Delawares" a constitutional right to receive payment from a statute enacted more than one hundred years later. See, *Northern Cheyenne Tribe* v. *Hollowbreast*, ... U.S. ..., No. 75-145, decided May 19, 1976.

CONCLUSION

The central premise around which virtually all of the "Kansas Delawares" Brief is constructed is that a statute valid on its face may, indeed, must be declared unconstitutional because the statute does not fit the "legislative object" or "purpose" which Appellees believe Congress had, or should have had, in mind in enacting the statute. As demonstrated, the premise is flawed and conclusions derived from it are, necessarily, equally flawed. See, *e.g.*, *Weber* v. *Freed*, 239 U.S. 325, 330; and *United States* v. *O'Brien, supra*, 391 U.S. 367, 383.

Even taken on its own terms, Appellees' argument as to Congress' motives for enacting 25 U.S.C. (Supp. IV) §§ 1291-1297 is most dubious. See, J.S. App. 89; 406 F.Supp. 1357 (Daugherty, J, dissenting).[7]

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[7] "Congress had before it another Bill which would have distributed [Indian Claims Commission Docket] 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in [Indian Claims Commission Docket] 337 [25 U.S.C. §1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls." Id.* (emphasis added).

Moreover, Appellees' arguments regarding their status *vis a vis* the status of their ancestors as of 1854 or 1866 are simply irrelevant to the question of Congress' express power to enact Indian affairs legislation dealing with the modern federally recognized Delaware Tribes, *Morton* v. *Mancari*, 417 U.S. 535, 552-553, and n. 24.

The statute at issue implicates no fundamental interest, involves no suspect classification, and was enacted in an area where Congress' power has, from the beginning of the Nation been held to be plenary. *E.g., Sizemore* v. *Brady, supra*, 235 U.S. 441, 447-449; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808, 813-814, *affirmed*, 384 U.S. 209. The present case presents no extraordinary facts or unique circumstances sufficient to justify an exception to precedents so long established and consistently applied by this Court as those concerning Congress' plenary power over Indian affairs.

Examination of the "Kansas Delawares" argument does not refute the correctness of this position. To the contrary, the "Kansas Delawares" entire argument really comes down to no more than the belief that Congress could have included them within the terms of this distribution statute, despite Article IX of the Treaty of July 4, 1866, 14 Stat. 793, 796, and that Congress should have done so. Assuming the correctness of the argument that Congress had the raw power to include the "Kansas Delawares" within the terms of 25 U.S.C. (Supp. IV) §§ 1291-1297, Appellees have failed to put forward any demonstration that, in an area where there is extraordinarily broad legislative discretion, the contrary decision reached by Congress ex-

ceeds the power of the Legislative Branch to enact legislation dealing with Indian Tribes, pursuant to its express constitutional authority.

For these reasons, as well as others urged in our original Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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October, 1976

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on the ____ day of October, 1976, serve three true and correct copies of the above and foregoing Reply Brief upon: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Appellees, Dorothy Frazier and Ruth Rattler; Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D.C. 20006, counsel of record for Appellee, Wanda June Weeks; and Mr. Joseph Fontana, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Appellants, Cherokee Delaware Class and named individual members thereof; by placing three copies of the same in the United States mail, postage fully prepaid; I further certify that I did on the ____ day of October, 1976, in conformity with Rule 33, 2(a) of the Rules of the Supreme Court, serve three true and correct copies of the above and foregoing Reply Brief upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, postage fully prepaid; I further certify that all parties required to be served have been served; and that service has been made in conformity with Rule 33 of the Rules of the Supreme Court.

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Bernard J. Rothbaum, Jr.